No. 16994

United States
Court of Appeals
for the Ninth Circuit

C. H. ELLE CONSTRUCTION CO., a Corporation, and ST. PAUL-MERCURY INDEMNITY CO., a Corporation,

Appellants,

vs.

WESTERN CASUALTY AND SURETY CO., a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Idaho, Eastern Division.

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—8-26-60

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

MERRILL & MERRILL,
Pocatello, Idaho,

Attorneys for Appellants.

O. R. BAUM,
BEN PETERSON,
RUBY Y. BROWN,

Box 570, Pocatello, Idaho,

Attorneys for Appellee.

In The United States District Court for the District of Idaho, Eastern Division

No. 1916

C. H. ELLE CONSTRUCTION CO., a corporation, Plaintiffs,

vs.

WESTERN CASUALTY AND SURETY COMPANY, a corporation, Defendant.

COMPLAINT

Comes now the plaintiff, C. H. Elle Construction Co., a corporation, and for cause of action against the defendant, complains and alleges:

I.

That the plaintiff C. H. Elle Construction Co., is a corporation duly organized and existing under and by virtue of the laws of the State of Idaho and is engaged in the general construction business with its principal place of business at Pocatello, Bannock County, Idaho.

II.

That the defendant, Western Casualty and Surety Company, is a foreign corporation organized and existing under the laws of the State of Kansas, and is duly qualified, licensed and authorized to do business in the State of Idaho as an insurance company, writing automobile liability coverage.

III.

That the plaintiff is a citizen of Idaho and the defendant is a citizen of the State of Kansas; that the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars.

IV.

That the defendant has heretofore issued a policy of automobile liability insurance to one William S. Gagon, insuring a certain two-ton truck owned by the said William S. Gagon against property damage and public liability for personal injury.

V.

That on or about the 22nd day of August, 1954, the above-mentioned vehicle owned by William S. Gagon was being driven, with the consent and permission of William S. Gagon, by one M. Burke Horsley; that the said M. Burke Horsely was at said time an employee of the plaintiff and was engaged in the scope of his employment with said plaintiff; that on said day there occurred a collision between said vehicle and an automobile driven by one Arnold Campbell as a result of which, on the 28th day of February, 1955, an action was filed in the District Court of the Fifth Judicial District of the State of Idaho in and for the County of Bannock by Mary Lou Campbell, and Terrell Ray Campbell, and Curtis Howard Campbell, minors by their guardian ad litem, Mary Lou Campbell, vs. C. H. Elle Construction Co., a corporation, M. Burke Horsley, Max Larson, and W. S. Gagon,

praying for money damages for the alleged death of Arnold Campbell, and further praying for property damage to the vehicle of Arnold Campbell.

VI.

That the above-described policy of insurance issued by Western Casualty and Surety Company included what is commonly known as an "omnibus clause" by the terms of which any person using the automobile of the named insured with the permission of said named insured is included within the coverage of the policy in the same manner as if he were the named insured; that said policy further provides that the insurer will defend any suit against the insured, will provide legal defense and costs thereof, and will pay on behalf of the insured all sums which the said insured shall become legally obligated to pay as damages because of bodily injury or injury to all destruction of property arising out of the use of the said automobile, and any person or organization legally responsible for the use of the automobile.

VII.

That under provisions of said policy the said plaintiff herein by and through its agents and servant, M. Burke Horsley, became an additional insured under the policy issued by the defendant.

VIII.

That demand has been made by this plaintiff upon the said defendant to assume the defense and

costs and other obligations pursuant to its contract and growing out of the above-described legal action, but said defendant has refused and still refuses, so to do.

IX.

That there is a controversy existing between the plaintiff and the defendant by reason of the aforesaid claim and by reason of the defendant's refusal to assume liability and obligations under its said insurance contract.

X.

That the plaintiff has no plain, speedy or adequate remedy at law.

Wherefore, plaintiff prays judgment against the defendant as follows:

1. That this Court adjudicate, declare and determine that the said defendant, by virtue of the above-described insurance policy, be required to provide public liability and property damage protection according to the said policy and be required to assume the costs of defense and the primary defense of the action entitled "In the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock, Mary Lou Campbell, and Terrell Ray Campbell and Curtis Howard Campbell, Minors, by their Guardian Ad Litem, Mary Lou Campbell, Plaintiffs, vs. C. H. Elle Construction Co., a corporation, M. Burke Horsley, Max Larsen, and W. S. Gagon, Defendants."

2. That the plaintiff have such other and further

relief as to this Court may seem meet and equitable, including its costs incurred herein.

MERRILL & MERRILL,
/s/ By W. F. MERRILL,
Attorneys for the Plaintiff.

[Endorsed] Filed Sept. 19, 1955.

[Title of District Court and Cause.]

SUMMONS

To The Above Named Defendant:

You are hereby summoned and required to serve upon Merrill and Merrill, plaintiff's attorneys whose address is Pocatello, Idaho, answer to the Complaint which is herewith served upon you within 20 (twenty) days after service of this Summons upon you exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

[Seal] /s/ By ED M. BRYAN,
Clerk of the Court.

Return On Service of Writ

United States of America,
District of Idaho—ss.

I hereby certify and return that I served the annexed Summons & Complaint on the therein-named Western Casualty and Surety Company, a corporation, by handing to and leaving a true and correct

copy thereof with Leo O'Connell, Commissioner of Insurance for the State of Idaho, personally at State Capitol Bldg. at Boise, Idaho, in the said District at 2:30 p.m., on the 22nd day of September, 1955.

Marshal's fees $2.00
Mileage .....None

Total $2.00

SAUL H. CLARK,
United States Marshal,
/s/ By REX WALTERS,
Deputy.

[Endorsed]: Filed Sept. 24, 1955.

[Title of District Court and Cause.]

MOTION TO DISMISS

The defendant herein moves the Court to dismiss the above entitled action for one, or more, or all, of the following reasons:

1. To dismiss the action on the ground that the Court lacks jurisdiction because the amount involved herein is a matter wherein the controversy does not now exceed, exclusive of interest and costs, the sum of $3,000.00.

2. That the Court lacks jurisdiction over the subject matter herein for the reason that the subject matter is a matter between two individuals,

and that the controversy cannot exceed the sum of $3,000.00, exclusive of interest and costs.

3. That the action was brought in the wrong District because:

(a) The jurisdiction of this Court is involved solely on the ground that the action arises under the Constitution and the laws of the United States, and the defendant is a corporation incorporated under the laws of the State of Kansas and is an inhabitant thereof, and qualified within the State of Idaho, and the jurisdiction is that of the Southern Division of the District of Idaho.

4. To dismiss the action, or in lieu thereof, to quash the return of summons on the ground that the defendant is a corporation organized under the laws of Kansas and was not, and is not, subject to service of process within the Eastern Division of the District of Idaho, United States of America.

5. To dismiss the action because the complaint fails to state a claim against the defendant upon which relief can be granted.

Dated this 10th day of October, 1955.

/s/ O. R. BAUM,
/s/ RUBY Y. BROWN,
Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed October 12, 1955.

[Title of District Court and Cause.]

MINUTE ORDER

Oct. 18, 1955

This cause came on regularly this date in open court for hearing on defendant's Motion to Dismiss, Wesley Merrill appearing for the plaintiff and O. R. Baum and Isaac McDougal appearing as counsel for the defendant.

After a discussion by counsel for the respective parties, it was ordered that the Motion to Dismiss be sustained and that plaintiff have five days to amend its Complaint.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Comes now the plaintiff, C. H. Elle Construction Co., a corporation, by way of an Amended Complaint, and for cause of action against the defendant, complains and alleges:

I.

That the plaintiff, C. H. Elle Construction Co., is a corporation duly organized and existing under and by virtue of the laws of the State of Idaho and is engaged in the general construction business with its principal place of business at Pocatello, Bannock County, Idaho.

II.

That the defendant, Western Casualty and Surety

Company, is a foreign corporation organized and existing under the laws of the State of Kansas, and is duly qualified, licensed and authorized to do business in the State of Idaho as an insurance company writing automobile liability coverage.

III.

That the plaintiff is a citizen of Idaho and the defendant is a citizen of the State of Kansas; that the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars.

IV.

That the defendant has heretofore issued a policy of automobile liability insurance to one William S. Gagon, insuring a certain two-ton Truck owned by the said William S. Gagon against property damage and public liability for personal injury, that said policy, Plaintiff is informed and believes, and therefore alleges the facts to be, insured the said William S. Gagon against property damage in the amount not to exceed $1,000.00 and for public liability for personal injury not to exceed $5,000.00 for injury to one person.

V.

That on or about the 22nd day of August, 1954, the above-mentioned vehicle owned by William S. Gagon was being driven, with the consent and permission of William S. Gagon, by one M. Burke Horsley; that the said M. Burke Horsley was at said time an employee of the plaintiff and was engaged in the scope of his employment with said

plaintiff; that on said day there occurred a collision between said vehicle and an automobile driven by one Arnold Campbell as a result of which, on the 28th day of February, 1955, an action was filed in the District Court of the Fifth Judicial District of the State of Idaho in and for the County of Bannock by Mary Lou Campbell, and Terrell Ray Campbell, and Curtis Howard Campbell, minors by their guardian ad litem, Mary Lou Campbell, vs. C. H. Elle Construction Co., a corporation, M. Burke Horsley, Max Larson, and W. S. Gagon, praying for money damages for the alleged death of Arnold Campbell, in the amount of $100,000.00 and further praying for property damage to the vehicle of Arnold Campbell in the amount of $1,-620.00.

VI.

That the above described insurance policy issued by Western Casualty and Surety Company, included what is normally known as an "omnibus clause." By the terms of which the word "insured" includes the named insured and also includes any person while using the vehicle and any person or organization legally responsible for the use thereof, providing the actual use of the vehicle is with the permission of the said insured; that any person or organization legally responsible for the use of said vehicle when the actual use is with the permission of the named insured is thereupon included in the coverage under the policy in the same manner as if named therein; that said policy further provides that the insurer or defendant, in the

event there is any suit against the insured, or those noted above, will provide legal defense or costs thereof and will pay on the behalf of the insured or any person or organization legally responsible for the use of the vehicle, all sums which said insured is legally obligated to pay as damages because of property injury or injury to a person arising out of the use of said vehicle by said named insured or any person or organization legally responsible for the use of the vehicle.

VII.

That under provisions of said policy the said plaintiff herein by and through its agents and servant, M. Burke Horsley, became an additional insured under the policy issued by the defendant.

VIII.

That demand has been made by this plaintiff upon the said defendant to assume the defense and costs and other obligations pursuant to its contract and growing out of the above described legal action, but said defendant has refused and still refuses, so to do.

IX.

That there is a controversy existing between the plaintiff and the defendant by reason of the aforesaid claim and by reason of the defendant's refusal to assume liability and obligations under its said insurance contract.

X.

That the plaintiff has no plain, speedy or adequate remedy at law.

Wherefore, plaintiff prays judgment against the defendant as follows:

1. That this court adjudicate, declare and determine that the said defendant, by virtue of the above-described insurance policy, be required to provide public liability and property damage protection according to the said policy and be required to assume the costs of defense and the primary defense of the action entitled "In the District Court of the Fifth Judicial District of the State of Idaho, In and for the County of Bannock, Mary Lou Campbell, and Terrell Ray Campbell and Curtis Howard Campbell, Minors, by their Guardian Ad Litem, Mary Lou Campbell, Plaintiffs, vs. C. H. Elle Construction Co., a corporation, M. Burke Horsley, Max Larsen, and W. S. Gagon, Defendants."

2. That the plaintiff have such other and further relief as to this court may seem meet and equitable, including its costs incurred herein.

MERRILL & MERRILL,
/s/ By W. F. MERRILL,
Attorneys for the Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed October 21, 1955.

[Title of District Court and Cause.]

MOTION FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL COMPLAINT

Comes now the plaintiff, C. H. Elle Construction Company, a corporation, and moves the Court for an Order permitting the plaintiff to file its Amended and Supplemental Complaint, for the reasons and upon the grounds set forth in said amended and Supplemental Complaint, a copy of which is attached hereto as Exhibit "A" and made a part hereof, and upon the grounds set forth in the Affidavit attached hereto as Exhibit "B".

MERRILL & MERRILL,
/s/ By W. F. MERRILL,
Attorneys For Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed June 13, 1956.

[Title of District Court and Cause.]

AFFIDAVIT FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL COMPLAINT

State of Idaho,
County of Bannock—ss.

Wesley F. Merrill, being first duly sworn, deposes and says:

That he is one of the attorneys for the plaintiffs in the above entitled action, and makes this Affi-

davit in support of the Motion for Leave to File Amended and Supplemental Complaint, filed concurrently herewith:

That since the filing of the original Complaint and Amended Complaint herein, the legal action filed in the District Court of the Fifth Judicial District of Idaho, in and for the County of Bannock, which said action is described in the said Complaints, has been tried before a jury and a judgment entered in favor of the plaintiffs; that said judgment in the District Court of the State of Idaho was rendered December 23, 1955, with a judgment for costs therein rendered May 29, 1956; that it becomes necessary, therefore, for plaintiff to file and serve an Amended and Supplemental Complaint to set forth the facts which have occurred since the Amended Complaint was filed, and set forth the complete and accurate damages suffered by said plaintiff;

That said facts have occurred since the former Amended Complaint herein was made and filed.

/s/ WESLEY F. MERRILL.

Subscribed and sworn to before me this 6th day of June, 1956.

[Seal] /s/ J. R. MOONEY, Jr.,
Notary Public for Idaho Residing at Pocatello, Idaho.

Acknowledgment of Service Attached.

[Endorsed]: Filed June 13, 1956.

[Title of District Court and Cause.]

AMENDED AND SUPPLEMENTAL COMPLAINT

Comes now the plaintiffs, C. H. Elle Construction Company, a corporation, and St. Paul-Mercury Indemnity Company, a corporation, leave having been granted by the Court, and by way of an Amended and Supplemental Complaint allege:

I.

That the plaintiff, C. H. Elle Construction Co., is a corporation duly organized and existing under and by virtue of the laws of the State of Idaho and is engaged in the general construction business with its principal place of business at Pocatello, Bannock County, Idaho.

II.

That the plaintiff, St. Paul-Mercury Indemnity Company, a corporation, is a foreign company organized and existing under the laws of the State of Minnesota, and is duly qualified, licensed and authorized to do business in the State of Idaho as an insurance company writing casualty and liability insurance coverage.

III.

That the defendant, Western Casualty and Surety Company, is a foreign corporation organized and existing under the laws of the State of Kansas, and is duly qualified, licensed and authorized to do business in the State of Idaho as an in-

surance company writing automobile liability coverage.

IV.

That the plaintiff, C. H. Elle Construction Company, a corporation, is a citizen of the State of Idaho, and the plaintiff, St. Paul-Mercury Indemnity Company, a corporation, is a citizen of the State of Minnesota; that the defendant is a citizen of the State of Kansas; that the matters in controversy exceed, exclusive of interest and costs, the sum of $3,000.00.

V.

That the said St. Paul-Mercury Indemnity Company has heretofore issued a policy of insurance, designated as a multiple coverage policy, insuring C. H. Elle Construction Company against loss from all such sums as the said C. H. Elle Construction Co. shall become obligated to pay by reason of liability imposed by law for bodily injury liability and automobile property damage, providing, however, that said insurance shall be excess beyond the amount payable under any other policy or policies affording insurance protection in any way to the said C. H. Elle Construction Company.

VI.

That the defendant has heretofore issued a policy of automobile liability insurance to one William S. Gagon, insuring a certain 1954 Chevrolet two-ton Truck owned by the said William S. Gagon against property damage and public liability for personal injury, that said policy, plaintiffs are informed and

believe, and therefore allege the facts to be, insured the said William S. Gagon against property damage in the amount not to exceed $10,000.00 and for public liability for personal injury not to exceed $10,000.00 for injury to one person.

VII.

That on or about the 22nd day of August, 1954, the above-mentioned vehicle owned by William S. Gagon was being driven, with the consent and permission of William S. Gagon, by one M. Burke Horsley; that the said M. Burke Horsley was at said time an employee of the plaintiff C. H. Elle Construction Co. and was engaged in the scope of his employment with the said C. H. Elle Construction Co.; that on said day there occurred a collision between said vehicle and an automobile driven by one Arnold Campbell, as a result of which, on the 28th day of February, 1955, an action was filed in the District Court of the Fifth Judicial District of the State of Idaho in and for the County of Bannock by Mary Lou Campbell, and Terrell Ray Campbell, and Curtis Howard Campbell, minors, by their guardian ad litem, Mary Lou Campbell, vs. C. H. Elle Construction Co., a corporation, M. Burke Horsley, Max Larson, and W. S. Gagon, praying for money damages for the alleged death of Arnold Campbell, in the amount of $100,000.00 and further praying for property damage to the vehicle of Arnold Campbell in the amount of $1,620.00.

VIII.

That the above described insurance policy issued by Western Casualty and Surety Company included what is normally known as an "omnibus clause," by the terms of which the word 'insured':

> "includes the named insured and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, providing the actual use of the automobile is by the named insured or with his permission;"

that any person or organization legally responsible for the use of said vehicle when the actual use is with the permission of the named insured is thereupon included in the coverage under the policy in the same manner as if named therein; that said policy further provides that the insurer or defendant, in the event there is any suit against the insured, or those noted above, will provide legal defense or costs thereof and will pay on the behalf of the insured or any person or organization legally responsible for the use of the vehicle, all sums which said insured is legally obligated to pay as damages because of property injury or injury to a person arising out of the use of said vehicle by said named insured or any person or organization legally responsible for the use of the vehicle.

IX.

That under provisions of said policy, the said plaintiff, C. H. Elle Construction Co., by and

through its agents and servant, M. Burke Horsley, became an additional insured under the policy issued by the defendant.

X.

That demand has been made by plaintiffs upon the said defendant to assume the defense and costs and other obligations pursuant to its contract and growing out of the above described legal action, but said defendant has refused, and continued to refuse, so to do.

XI.

That since the filing of the original Complaint herein, and on December 23, 1955, judgment was entered in the above described cause in favor of the plaintiffs, Mary Lou Campbell, and Terrell Ray Campbell and Curtis Howard Campbell, minors, by their guardian ad litem, Mary Lou Campbell, and against C. H. Elle Construction Co., a corporation, and M. Burke Horsley, in the amount of $15,000.00, and a judgment for costs was entered the 29th day of May, 1956, in the amount of $371.40.

XII.

That said judgment in the total amount of $15,-371.40 has been paid, for and on behalf of C. H. Elle Construction Co., a corporation, by the plaintiff, St. Paul-Mercury Indemnity Co., a corporation; that the costs of legal defense of the said C. H. Elle Construction Co., a corporation, and M. Burke Horsley totalled a sum of $1,639.53, which has been paid by the plaintiff, St. Paul-Mercury

Indemnity Co., for and on behalf of the said C. H. Elle Construction Co.

XIII.

That the said plaintiffs herein have been damaged in the sum of $17,010.93, of which sum the defendant herein is obligated for the amount of $10,000.00 under the public liability portion of its policy, $1,620.00 under the property damage portion of its policy, and $1,639.53 as legal expenses and costs, making a total of $13,259.53.

Wherefore, plaintiffs pray judgment against defendant for $13,259.53, plus costs of suit incurred herein and such other and further relief as to this Court may seem meet and equitable in the premises.

MERRILL & MERRILL,
/s/ By W. F. MERRILL,
Attorneys for Plaintiffs.

[Endorsed]: Filed June 13, 1956.

[Title of District Court and Cause.]

ANSWER TO AMENDED AND SUPPLEMENTAL COMPLAINT

Comes now the defendant, as and for its answer to the amended and supplemental complaint as filed by the plaintiffs herein, and alleges, affirms and denies as follows:

First Defense

The amended and supplemental complaint fails to state a claim against the defendant upon which relief can be granted.

Second Defense

I.

Defendant admits the allegations of paragraphs I, II and III.

II.

Answering paragraph IV defendant admits all of the allegations therein contained, save and except the following: "that the matters in controversy exceed, exclusive of interest and costs, the sum of $3,000.00," and as to such allegations denies each and every allegation of such quoted portion.

III.

Answering paragraph V defendant denies each and every allegation in said paragraph contained and states that, while an insurance policy was issued, the same is not the type and kind as alleged by said plaintiffs.

IV.

Answering paragraph VI defendant admits that there was issued to William S. Gagon an insurance policy, but denies that the said policy is the type and kind as set out in said paragraph or that it is in the amounts as set out in said paragraph.

V.

Answering paragraph VII defendant denies each and every allegation in said paragraph contained, save and except the allegation in reference to the institution of an action by Mary Lou Campbell, and as to that allegation, admits such an action was filed.

VI.

Answering paragraph VIII defendant denies each and every allegation in said paragraph contained, and states the facts to be that the policy did not provide, and does not provide, protection for matters and things as maintained and as set out by the said plaintiffs, and further states that said plaintiffs are not in a position to take advantage of or be given consideration as to a contract between said defendant and the said William S. Gagon, and further states that the policy provides only for the holding of William S. Gagon free and harmless by virtue of any claim that has been reduced to judgment, where the said William S. Gagon is obligated to make payment, and that in the action referred to in the plaintiffs' complaint, the said William S. Gagon was exonerated and he has no obligation to any person or persons whomsoever by reason thereof; and by reason of the terms of said policy, the said defendant herein is not obligated to pay any sum or sums of money whatsoever.

VII.

Answering paragraphs IX and X of said amended and supplemental complaint, defendant denies each and every allegation in each of said paragraphs contained.

VIII.

Answering paragraph XI defendant states that in the action referred to in said paragraph a judgment was rendered against the defendants C. H.

Elle Construction Company and M. Burke Horsley in the amount of $15,000.00, but states it has no information as to the amount of costs allowed, and therefore denies that costs in the amount of $371.40, or any other sum or amount, were allowed, and further states in answer to such paragraph that in such action William S. Gagon was made a party defendant and that the cause was tried before a jury and the jury brought in a verdict in favor of William S. Gagon and against the plaintiffs, and in the same action the jury brought in a verdict in favor of Mary Lou Campbell et al. and against the defendant C. H. Elle Construction Company and the defendant M. Burke Horsley, a copy of the said judgment or order as entered by the District Judge after the return of said verdict is attached hereto and marked Exhibit "A" and made a part hereof as fully and completely as if copied herein at length; and thereafter a judgment for costs was entered herein, a copy of such judgment in favor of the defendant William S. Gagon is hereto attached and marked Exhibit "B" and made a part hereof as fully and completely as if copied herein at length; that by the terms of such judgment and as the result of such action the said William S. Gagon was exonerated and your said defendant herein is not obligated to pay any sum or sums of money whatsoever on behalf of the said William S. Gagon, and not until a judgment had been entered against the said William S. Gagon was there any obligation upon your said defendant to make payment of any sum or sums of money whatsoever.

IX.

Answering paragraph XII defendant states it has not sufficient information upon which to base an affirmation or denial of the same, and therefore denies each and every allegation in said paragraph contained.

X.

Answering paragraph XIII defendant denies that the plaintiffs have been damaged in the sum of $17,010.93, and likewise denies that the defendant herein is obligated to pay the sum of $10,000.00 or any other sum under the public liability portion of its policy, and likewise denies that is is obligated to pay $1620.00 or any other sum or any other amount under the property damage portion of its policy, and likewise states that it is under no obligation to pay $1,639.53, or any other sum or any other amount, as legal expenses, and likewise denies it is obligated to pay a total of $13,259.53 or any other sum or any other amount.

Third Defense

Defendant as and for its First Affirmative Defense, termed "Third Defense," alleges:

I.

That the said plaintiffs herein are now and at all times herein mentioned have been represented by the identical counsel that appears for said plaintiffs in this instant action, and that in the action referred to in paragraph VII of said amended and supplemental complaint the said identical counsel

appeared therein for the defendant C. H. Elle Construction Company, a corporation, M. Burke Horsley and Max Larsen, and that in such action the said defendants, C. H. Elle Construction Company, the said Max Larsen and the said M. Burke Horsley each filed separate answers, and that in such action so filed by Mary Lou Campbell as hereinbefore referred to, the said Mary Lou Campbell, in her Second Amended Complaint alleged among other things, as follows:

> "That at all times mentioned herein, defendant, William S. Gagon, was the owner of a 1954 Chevrolet truck, bearing 1954 Idaho License, 3C-1010; that at such times the defendants, M. Burke Horsley and Max Larsen, were operating such truck with the permission and consent of the owner, William S. Gagon."

and that said paragraph was numbered paragraph "IV" of said Second Amended Complaint, and to such paragraph IV, the plaintiffs herein, and each of them, answered the same as follows:

> "Answering paragraph IV of said Second Amended Complaint, this answering defendant admits that William S. Gagon was the owner of a 1954 Chevrolet truck bearing 1954 Idaho license plates 3C-1010, but denies each and every other allegation contained in said paragraph."

thereby denying that the said truck in question was being driven "with the permission and consent of

the owner, William S. Gagon"; that the said pleadings in the said action referred to in paragraph VII of the amended and supplemental complaint herein are hereby made a part hereof by reference as fully and completely as if copied herein at length, and that the said action was tried upon the theory that no permission or consent had been given; that the said C. H. Elle Construction Company and the said M. Burke Horsley cooperated one with the other and went forward in said action under the pleadings herein set forth, and as the result of said trial the said William S. Gagon was exonerated, all as hereinbefore stated, and that in such action, so referred to in paragraph VII of the Amended and Supplemental Complaint herein, the said C. H. Elle Construction Company, one of the plaintiffs herein, and M. Burke Horsley admitted that M. Burke Horsley was an employee of the C. H. Elle Construction Company, and that at the time of the accident he was acting in the line, course and scope of his employment as an employee of the C. H. Elle Construction Company, and that the said action was defended at the specific direction, and under the order, of the said remaining plaintiff herein, the St. Paul-Mercury Indemnity Company, and that the said St. Paul-Mercury Indemnity Company, in each and every phase of said cause, employed the counsel that appeared for defendant C. H. Elle Construction Co., directed the course of such litigation by the same counsel that is counsel for the plaintiffs herein, and that at all times the said plaintiff, St. Paul-Mercury Indemnity Com-

pany, knew, or should have known, the theory upon which said cause was tried, and that the President of the C. H. Elle Construction Company, a corporation, knew, or should have known the theory upon which said cause was tried and the manner in which the cause went to trial and that the said C. H. Elle, an individual, being President of the said C. H. Elle Construction Company, was in and about the courtroom at said trial and at all times participated in said trial, and upon information and belief, defendant herein alleges that said action herein was instituted without the consent and without the knowledge of the said C. H. Elle Construction Company, and that in the instant action, in paragraph VII of said amended and supplemental complaint, the two plaintiffs herein allege, among other things, the following:

> "* * * the above mentioned vehicle owned by William S. Gagon was being driven, with the consent and permission of William S. Gagon, by one M. Burke Horsley; * * *"

and that it is admitted in each of the pleadings that M. Burke Horsley was employed by the said C. H. Elle Construction Company and was acting in the line, course and scope of his employment at the time of the said accident, and that the plaintiffs herein, and each of them, are estopped from asserting herein the position that they have asserted, on account of the position or positions that each of them heretofore took in the course of the litigation referred to in the amended and supplemental com-

plaint and that the said action herein is an action so to speak upon the judgment that was rendered in said cause referred to in the said amended and supplemental complaint and it has reference to the same facts or state of facts, and that the pleadings of the plaintiffs herein, and each of them, are inconsistent with and contrary to the pleadings in the instant case, and also by the nature of the position that each of the said plaintiffs, or their officers and agents, took in such matter, the said plaintiffs, and each of them, cannot, at this time, in justice and in the cause of orderliness, regularity and expedition of litigation, be heard to say that they should recover in the instant action.

Fourth Defense

Defendant as and for its Second Affirmative Defense, termed "Fourth Defense," alleges:

I.

That in the said action referred to in said paragraph VII of the amended and supplemental complaint filed herein the said William S. Gagon was made a party by reason of the provisions of Section 49-1004, Idaho Code, and that in such action referred to in such paragraph, the same being filed in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock, it was alleged as follows:

> "That at all times mentioned herein, defendant, William S. Gagon, was the owner of a 1954 Chevrolet Truck, bearing 1954 Idaho Li-

> cense, 3C-1010; that at such times the defendants, M. Burke Horsley and Max Larsen, were operating such truck with the permission and consent of the owner, William S. Gagon."

and that without such an allegation there was no cause of action stated against the said defendant William S. Gagon, and that the said William S. Gagon, in such action, denied such allegation, and that as a result of such trial so had, all as hereinbefore alleged, the said William S. Gagon was exonerated; that the provisions of Sec. 49-1004, Idaho Code, are as follows:

"Owner's tort liability for negligence of another. Subrogation.—1. Responsibility of owner for negligent operation by person using vehicle with permission—Imputation of negligence. Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, expressed or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages.

"2. Limitation of liability. The liability of an owner for imputed negligence imposed by this section and not arising through the relationship of $5,000 for the death or injury to one person in any one accident and subject to said limit as to one person is limited to the amount of $10,000 with re-

spect to the death or injury to more than one person in any one accident and is limited to the sum of $1,000 for damage to property of others in any one accident.

"3. Operator to be made party defendant—Recourse to operator's property. In any action against an owner on account of imputed negligence as imposed by this section the operator of said vehicle whose negligence is imputed to the owner shall be made a party defendant if personal service of process can be had upon said operator within this state. Upon recovery of judgment, recourse shall first be had against the property of said operator so served.

"4. Subrogation of owner to rights of person injured—Recovery from operator—Bailee and driver deemed operators. In the event a recovery is had under the provisions of this section against an owner on account of imputed negligence such owner is subrogated to all the rights of the person injured and may recover from such operator the total amount of any judgment and costs recovered against such owner. If the bailee of an owner with the permission, expressed or implied, of the owner, permits another to operat*or* the motor vehicle of the owner, then such bailee and such driver shall both be deemed operators of the vehicle of the owner, within the meaning of subdivisions 3 and 4 of this section.

"5. Settlement and payment of claims where two or more are injured or killed in one accident—Diminution or extinguishment of owners liability.

Where two or more persons are injured or killed in one accident, the owner may settle or pay any bona fide claim or claims for damages answering out of personal injuries or death, whether reduced to a judgment or not, and such payments shall diminish to the extent thereof the owners total liability on account of such accident; and payments so made aggregating the full sum of $10,000 shall extinguish all liability of the owner hereunder to said claimants and all other persons on account of such accident; which liability may exist by reason of imputed negligence, pursuant to this section, and not arising through the negligence of the owner nor through the relationship of principal and agent nor master and servant.

"6. Vendee or assignee not deemed owner until possession retaken—Chattel mortgagee not deemed owner. If a motor vehicle is sold under a contract of conditional sale whereby the title to such motor vehicle remains in the vendor, such vendor or his assignee shall not be deemed as owner within the provisions of this section, but the vendee or his assignee, shall be deemed the owner notwithstanding the terms of such contract, until the vendor or his assignee retake possession of such motor vehicle. A chattel mortgagee of a motor vehicle out of possession shall not be deemed an owner within the provisions of this section."

and that it is admitted in the pleadings in the action in the State Court, namely, the one referred to in Paragraph VII of the Amended and Supple-

mental Complaint, that the said M. Burke Horsley was the agent and employee of the said C. H. Elle Construction Company and was acting in the line, course and scope of his employment at the time of such accident, and that the said William S. Gagon had no liability in such matter and was not obligated to do anything in the matter except defend himself, all of which he did do, and was exonerated, and that if there had been judgment rendered against the said William S. Gagon by reason of having given consent and permission to drive said truck, then and in that event, he would have been subrogated to the rights of the person injured and could have recovered from said operator, and that the said operator was M. Burke Horsley, an agent and employee of the said C. H. Elle Construction Company; and in the event the said M. Burke Horsley failed to pay the said claim of the said William S. Gagon, then and in that event the said William S. Gagon, or his insurer, could have, and would have, proceeded against the said C. H. Elle Construction Company, and eventually against the St. Paul-Mercury Indemnity Company; and that in such action the said operator was made a party pursuant to the provisions of such section, and that if Idaho had not had the provisions of such section aforementioned, the said William S. Gagon would have been in nowise responsible and in nowise liable for any sum or sums of money whatsoever, and that said action was tried upon the theory that the said William S. Gagon's liability was limited to the sum of $5,000.00 for the death or injury to one person

in one accident and not in the sum of $10,000.00, or any other sum or any other amount, and likewise was tried upon the theory that the total amount of damages to the property was a sum not to exceed $1,000.00, and that the plaintiffs herein, and each of them, through their officers, agents and employees, all as hereinbefore stated, participated in said cause and took the position as shown by the pleadings in said original cause, and they should not at this time be permitted to say otherwise nor should they be permitted to take a contrary and other view of the matter than taken in the said original action, and that in no event, and under no theory of the said matter, could the said William S. Gagon have been responsible or liable for the injury of the said Arnold Campbell to exceed the sum of $5,000.00, and notwithstanding such facts, said plaintiffs herein seek to recover of and from the said defendant the sum of $10,000.00 on account of injury or death of the said Arnold Campbell, he being the deceased referred to in said original action; that the plaintiffs, and each of them, were aware of the position as taken by the plaintiffs in said original action so filed in the State Court, and the plaintiffs, and each of them, participated in the trial of the action which was instituted herein and the theory as adopted by the said William S. Gagon was consented to as being the correct position to be taken by the said William S. Gagon, and that under the statutes of the State of Idaho the said defendant is not responsible for any sum or sums of money whatsoever until the said owner of such

vehicle is proved to have given his permission and consent for the use of such vehicle so involved in such accident, and that a judgment has been rendered herein in favor of said William S. Gagon, and that by reason of said judgment which was entered as the result of said trial and by reason of the matters hereinbefore set forth, the said plaintiffs, and each of them, are estopped from asserting otherwise and should not be permitted to be heard further in said cause; that a copy of the files of the action of Mary Lou Campbell et al. vs. C. H. Elle Construction Co., et al., all as filed in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock, is made part hereof by reference as fully and completely as if copied herein at length.

Fifth Defense

Defendant as and for its Third Affirmative Defense, termed "Fifth Defense," alleges:

I.

That the said defendant herein issued a policy of insurance to William S. Gagon, and that by the terms thereof, and pursuant to the provisions of the statutes of Idaho and the laws under which the said policy was issued, if the said William S. Gagon received a judgment against him, and if the same came within the terms of the policy and within the provisions of the statutes of the State of Idaho, then and in that event the said defendant herein would have been responsible to the party holding

such judgment; that is to say, your said defendant agreed to hold the said William S. Gagon free and harmless by reason of any judgment that may have been rendered; that there was no judgment rendered against the said William S. Gagon and that your said defendant is in nowise, and in no manner, obligated to the said plaintiffs, or either of them, in any sum or sums of money whatsoever, and that under the terms of said policy and under the statutes of the State of Idaho, as well as under the theory on which said action or actions was tried, and under no circumstances, no matter what the theory may have been, is the defendant obligated to pay any sum or sums of money whatsoever to the said plaintiffs.

Sixth Defense

Defendant as and for its Fourth Affirmative Defense, termed "Sixth Defense," alleges:

That your said defendant as a further defense to the said amended and supplemental complaint of the plaintiffs herein alleges on information and belief that the said C. H. Elle Construction Company has not as a matter of fact paid any sum or sums of money whatsoever, and that it is not now, nor has it ever been, a proper party plaintiff, and it is not now at this time entitled to go forward in such matter, as it has not obligated itself to pay any sum or sums of money whatsoever and that no funds have been expended by the said C. H. Elle Construction Company.

Seventh Defense

Defendant as and for its Fifth Affirmative Defense, termed "Seventh Defense," alleges:

That in the action referred to in paragraph VII of plaintiffs' amended and supplemental complaint the plaintiff herein, C. H. Elle Construction Company was before the court and that its defense was being directed and conducted by the said plaintiff, St. Paul-Mercury Indemnity Company, and that in truth and in fact the said St. Paul-Mercury Indemnity Company took over the complete handling and conducting of the defense of the C. H. Elle Construction Company, and that all of the parties to this action, or their privies in interest, were litigants and were parties to the action of Mary Lou Campbell et al. v. C. H. Elle Construction Company, et al., which action has been heretofore referred to, and in said action said parties, and each of them, had an opportunity to, and were in a position to, and had the right to, bring in additional parties, to wit, the said defendant herein, and to set forth any right, claim or interest that they may have had as against the said William S. Gagon and his insurer, the defendant herein, and that the said plaintiffs, and each of them, knew, long prior to the time of the action in the State Court, that the said William S. Gagon's defense was being directed for and on behalf of the said defendant herein, and that all matters and things between said parties were litigated, and that an opportunity was had by said plaintiffs to have the identical question herein sought to be litigated, litigated in the other action,

and that the said judgment as rendered in said cause so filed in said state court constitutes an estoppel by record, and likewise the said matters and things herein sought to be set forth have heretofore been litigated, or could have been litigated in the other action, and therefore and by reason of these facts, said plaintiffs are not now entitled to be heard in such matters or to by these proceedings go forward.

Wherefore, Defendant having fully answered said amended and supplemental complaint of the plaintiffs prays that it may be dismissed with its costs and all proper relief.

/s/ O. R. BAUM,
/s/ RUBY Y. BROWN,
Attorneys for Defendant.

EXHIBIT "A"

In the District Court of the Fifth Judicial District of the State of Idaho in and for the County of Bannock

MARY LOU CAMPBELL and TERRELL RAY CAMPBELL and CURTIS HOWARD CAMPBELL, Minors, by their Guardian Ad Litem, MARY LOU CAMPBELL,

Plaintiffs,

vs.

C. H. ELLE CONSTRUCTION CO., a corporation, M. BURKE HORSLEY, MAX LARSEN, and W. S. GAGON, Defendants.

ORDER

This matter coming on for hearing before the Honorable Henry McQuade, District Judge, in open court sitting with a jury, and the plaintiffs, Mary Lou Campbell and Terrell Ray Campbell and Curtis Howard Campbell, Minors, by their Guardian Ad Litem, Mary Lou Campbell, being present in person and by their counsel, Gee & Hargraves, and the defendants, C. H. Elle Construction Co., a corporation, and M. Burke Horsley, being present by their counsel, Merrill & Merrill, and the defendant, W. S. Gagon, being present by his counsel, O. R. Baum and Ruby Y. Brown, and after the matter was given the jury the jury returned a verdict in favor of the defendant, W. S. Gagon, and against the plaintiffs, Mary Lou Campbell and Terrell Ray

Campbell and Curtis Howard Campbell, Minors, by their Guardian Ad Litem, Mary Lou Campbell; and

It Is Therefore Ordered that the plaintiffs, Mary Lou Campbell and Terrell Ray Campbell and Curtis Howard Campbell, Minors, by their Guardian Ad Litem, Mary Lou Campbell, take nothing as to the defendant, W. S. Gagon, and the defendant, W. S. Gagon, is entitled to his costs in the sum of $.....

Dated this 28th day of December, 1955.

HENRY McQUADE,
District Judge.

Exhibit "B"

[Title of District Court and Cause.]

JUDGMENT AS TO COST ON BEHALF OF DEFENDANT W. S. GAGON

It appearing to the Court that heretofore a verdict in favor of the defendant W. S. Gagon and against the plaintiffs, Mary Lou Campbell and Terrell Ray Campbell and Curtis Howard Campbell, Minors, by their Guardian Ad Litem, Mary Lou Campbell, having been rendered, and thereafter a Cost Bill having been filed, and the plaintiffs having moved to re-tax costs, and after presentation, the matter was taken under advisement by the Court, and the Court having heretofore entered a Memorandum Decision,

Now, Therefore, in accordance with such Memorandum Decision,

It Is Ordered, Adjudged and Decreed that the defendant W. S. Gagon have costs allowed in the sum of $90.00, such sum being made up of costs as follows:

Witness Dr. Allan Tigert	$24.00
Witness Melba Personette	$24.00
Witness Elsie Woodall	$21.00
Witness Art Kelly	$21.00

and such amounts totaling $90.00 as above stated.

It Is Further Ordered that judgment in favor of W. S. Gagon and against the said plaintiffs for such amount is hereby ordered.

Let Execution Issue.

Dated this 24th day of May, 1956.

HENRY McQUADE,
District Judge.

[Endorsed]: Filed June 26, 1956. Sarah Devaney, Clerk Auditor and Recorder.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 6, 1956.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the defendant and moves the Court to dismiss the above entitled action for the reason that the said Amended and Supplemental Complaint fails to state a claim against the defendant herein.

Dated this 5th day of July, 1956.

/s/ O. R. BAUM,
/s/ RUBY Y. BROWN,
Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 6, 1956.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the defendant and moves the Court to dismiss the plaintiff C. H. Elle Construction Co., a corporation, from said cause, for the reason that the Amended and Supplemental Complaint fails to state a claim against the defendant herein, in that it is alleged affirmatively that some person, other than the C. H. Elle Construction Company, a corporation, paid the said judgment referred to in said action.

Dated this 5th day of July, 1956.

/s/ O. R. BAUM,
/s/ RUBY Y. BROWN,
Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 6, 1956.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the defendant, Western Casualty and Surety Company, a corporation, and moves the

Court to dismiss from such action the St. Paul-Mercury Indemnity Co., a corporation, for the reason that the Court lacks jurisdiction of said plaintiff, in this, that the said original action herein was instituted by C. H. Elle Construction Co., a corporation, as plaintiff, and that no order has ever been sought or had bringing in the said St. Paul-Mercury Indemnity Co.

Dated this 5th day of July, 1956.

/s/ O. R. BAUM,
/s/ RUBY Y. BROWN,
Attorneys for Defendant.

Acknowledgment of Service Attached.
[Endorsed]: Filed July 6, 1956.

[Title of District Court and Cause.]

MOTION TO STRIKE FROM ANSWER TO AMENDED AND SUPPLEMENTAL COMPLAINT

Come now the plaintiffs and move the Court to strike from the Answer to Amended and Supplemental Complaint heretofore filed by the defendant the following:

(a) All of that portion of said Answer to Amended and Supplemental Complaint designated as Third Defense, for the reason that the same fails to state any defense or pleadings of a defense to the Amended and Supplemental Complaint of the plaintiffs, and that the same sets forth nothing other than evidenciary allegations.

(b) All of the Answer to Amended and Supplemental Complaint designated as Fourth Defense on the grounds and for the reason that said defense is immaterial and fails to state any matter constituting a defense to the Amended and Supplemental Complaint.

(c) All of that portion of the Answer to the Amended and Supplemental Complaint designated as the Seventh Defense on the grounds that said Seventh Defense is immaterial and fails to state a defense to the Amended and Supplemental Complaint heretofore filed.

MERRILL & MERRILL,
/s/ By W. F. MERRILL,
Attorneys for Plaintiffs.

Affidavit of Mailing Attached.

[Endorsed]: Filed Aug. 17, 1956.

[Title of District Court and Cause.]

MINUTE ORDER

October 8, 1956

This cause came on regularly this date in open court on defendant's Motions to Dismiss & To Strike, W. F. Merrill appearing as attorney for the plaintiffs and Ben Peterson appearing as counsel for the defendants.

After a discussion by counsel of the respective parties, the Court took the Motions under advisement.

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS

Plaintiffs hereby request the defendant to make the following admissions for the purpose of the within action only, within 10 days after service of this request.

I.

That each of the following documents exhibited with this request is genuine:

a—The Standard Combined Automobile Policy, policy No. UI 518973, issued to William S. Gagon, Soda Springs, Idaho, with a policy paid from July 22, 1954 to July 22, 1955; a copy of which policy is attached hereto.

b—That document designated as SR-21, Notice of Policy under section 5, Idaho Motor Vehicle Safety Responsibility Act, dated October 5th, 1954, signed the Western Casualty and Surety Company, Fort Scott, Kansas, by American Agencies, Inc., general agents, by A. W. Kay, Secretary, a copy of which SR-21 is attached hereto.

II.

That each of the following statements is true.

a—That the said policy noted above insured the 1954 Chevrolet six wheel two ton truck, serial No. X54F018590;

b—That on the 22nd day of August, 1954, the above described policy of insurance was in effect.

c—That on the 22nd day of August, 1954 the above described Chevrolet truck was involved in a collision with a vehicle driven by one Arnold Campbell.

d—That at the time of said collision, on the 22nd day of August, 1954, the above described 1954 Chevrolet truck was being operated by one M. Burke Horsley.

e—That on the 22nd day of August, 1954, the said M. Burke Horsley was an employee of C. H. Elle Construction Company, a corporation.

f—That on the 28th day of February, 1955 an action was filed in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock by Mary Lou Campbell, and Terrell Ray Campbell, and Curtis Howard Campbell, minors, by their guardian ad litem, Mary Lou Campbell, vs. C. H. Elle Construction Company, a corporation, M. Burke Horsley, Max Larson, and W. S. Gagon, praying for money damages for the alleged death of Arnold Campbell, in the amount of $100,000.00 and further praying for property damage to the vehicle of Arnold Campbell in the amount of $1,620.00.

g—That on the 23rd day of December, 1955, a Judgment was entered in the action described in paragraph f— above in favor of the plaintiffs, Mary Lou Campbell, and Terrell Ray Campbell, and Curtis Howard Campbell, minors, by their guardian ad litem, Mary Lou Campbell, against

C. H. Elle Construction Company, a corporation, and M. Burke Horsley, in the amount of $15,000.00, with costs in the amount of $371.40.

h—That the above described policy of insurance contained the following provisions, as paragraph III under Insuring Agreements:

"With respect to the insurance for bodily injury liability and for property damage liability the unqualified word 'insured' includes the named insured and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission. The insurance with respect to any person or organization other than the named insured does not apply:

"(a) To any person or organization, or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency, service station or public parking place, with respect to any accident arising out of the operation thereof, but this exclusion does not apply to a member of the same household as the named insured or to a partner, agent or employee of either;

"(b) To any employee with respect to injury to or sickness, disease or death of another employee of the same employer injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such employer."

i—That demand was made upon the defendant to assume the defense, costs and other obligations pursuant to the contract of insurance issued by Western Casualty and Surety Company to William S. Gagon, said demand being a letter dated March 30, 1955, addressed to Western Casualty Company, Fort Scott, Kansas, through: O. R. Baum, Attorney at Law, Carlson Building, Pocatello, Idaho; that the letter attached hereto is a true and correct copy of said letter of demand.

j—That the copy of the SR-21 attached hereto and referred to in said paragraph I b—above, is a true and correct copy of said SR-21 so filed.

k—That the statements in the said SR-*2;* are in accord with the facts.

l—That on the 22nd day of August, 1956, M. Burke Horsley, as an employee of C. H. Elle Construction Company, a corporation, requested permission to use the above described Chevrolet truck from Mrs. Jesse Gagon, wife of William S. Gagon, who thereupon granted the permission, turned over the keys of said vehicle to M. Burke Horsley, and the said M. Burke Horsley thereupon used truck pursuant to this permission so given.

m—That William S. Gagon did, subsequent to the 22nd day of August, 1954, and during the month of October, 1954, present a bill to the C. H. Elle Construction Company, a corporation, for the use of the above described 1954 Chevrolet truck on the 22nd day of August, 1954, which said bill was paid

by the C. H. Elle Construction Company, a corporation, the same being in the amount of $15.00.

n—That the said Jesse Gagon, was on the 22nd day of August, 1954, and had been for many years prior thereto, the wife of William S. Gagon.

o—That the said Jesse Gagon was the bookkeeper for and worked in the office of the Gagon Lumber Company, a lumber business owned and operated by the said William S. Gagon and Jesse Gagon.

p—That the said 1954 Chevrolet truck was a truck used in the said lumber business.

Dated this 31st day of October, 1956.

MERRILL & MERRILL,
/s/ By W. F. MERRILL,
Attorneys for Plaintiffs.

Affidavit of Mailing Attached.

No. UI 518973
Renewal of No. UI 164636

DECLARATIONS

Item 1. Name of Insured W. S. GAGON

Address ___ NO. ___ STREET SODA SPRINGS TOWN CARIBOU COUNTY IDAHO STATE

Garage: The automobile will be principally garaged in the above town, county and state, unless otherwise stated herein: ___

Occupation of the named insured is LUMBER BUSINESS, BUILDER, HARDWARE DEALER, SELF, SODA SPRINGS

Loss Payee: Any loss under coverages D, E-1, E-2, F, G-1, H and I is payable as interest may appear to the named insured and ___ NAME AND ADDRESS

Item 2. Policy Period: From JULY 22, 1954 to JULY 22, 1955
12:01 A. M., standard time at the address of the named insured as stated herein.

Item 3. The insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges. The limit of the company's liability against each such coverage shall be as stated herein, subject to all the terms of this policy having reference thereto.

	COVERAGES	LIMITS OF LIABILITY	PREMIUMS THE WESTERN CASUALTY AND SURETY COMPANY	PREMIUMS THE WESTERN FIRE INSURANCE COMPANY
A	Bodily Injury Liability	$ 10,000.00 each person $ 20,000.00 each accident	$ 25.00	
B	Property Damage Liability	$ 10,000.00 each accident	$ 22.00	
C	Medical Payments	$ each person	$	
D	Comprehensive—Loss of or damage to the Automobile except by Collision or Upset but including Fire, Theft and Windstorm	$ (Insert amount or "Actual Cash Value")		$
E-1	Collision or Upset	Actual Cash Value less $ 100.00 which deductible amount shall be applicable to each Collision or Upset		$ 24.00
E-2	Convertible Collision or Upset Additional Payment $	Actual Cash Value		$
F	Fire, Lightning and Transportation	$ ACTUAL CASH VALUE		$ 7.00
G-1	Theft (Broad Form)	$ ACTUAL CASH VALUE		$ INCLUDED
H	Windstorm, Earthquake, Explosion, Hail or Water	$		$
I	Combined Additional Coverage (including M. M. & V.)	$		$
J	Towing and Labor Costs	$10 for each disablement		$
		Total Premiums by Company:	$ 47.00	$ 31.00
		Grand Total Premium $	78.00	

Item 4. Description of the automobile and facts respecting its purchase by the named insured and terms of any encumbrance:

Year of Model	Trade Name	Model	Body Type; Truck Type, Truck Load Capacity; Tank Gallonage Capacity, or Bus Seating Capacity	Serial Number Motor Number	Number of Cylinders
1948	G. M. C.	FC304	2 TON TRUCK 6 WHEEL REAR DUELS	B 20201 M A 24856220	6

F. O. B. List Price or Delivered Price at Factory	Actual Cost When Purchased Including Equipment	Purchased: Month, Year	Purchased: New or Used	The automobile is unencumbered unless otherwise stated herein: Encumbrance	Installment Payments: Number	Installment Payments: Amount of Each	Due Date and Amount of Final Installment
Rating Symbol ___ $	$ 3000.00	M Y 7/48	NEW	$	$		$

Item 5. Use: The purposes for which the automobile is to be used are COMMERCIAL CLASS 5CA
(a) The term "pleasure and business" is defined as personal, pleasure, family and business use. (b) The term "commercial" is defined as use principally in the business occupation of the named insured as stated in item 1, including occasional use for personal, pleasure, family and other business purposes. (c) Use of the automobile for the purposes stated includes the loading and unloading thereof.

Item 6. Except with respect to bailment lease, conditional sale, mortgage or other encumbrance the named insured is the sole owner of the automobile, except as herein stated. NO EXCEPTIONS

Countersigned JULY 22 19 54,
at SODA SPRINGS, IDAHO
By ___ Authorized Agent
E. W. LAROILLIERE, JR.

FORM UI 1070-450,001-600,000

THE WESTERN CASUALTY AND SURETY COMPANY
THE WESTERN FIRE INSURANCE COMPANY

FORT SCOTT, KANSAS

(Each a stock insurance company)

No. UI 518973

ISSUED TO W. S. GAGON

ADDRESS SODA SPRINGS, IDAHO

EXPIRES JULY 22, 1955 PREMIUM $78.00

STANDARD COMBINED AUTOMOBILE POLICY

REPRESENTED BY
This is to certify that this is a true and correct copy of the above numbered policy.

Underwriter

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THE WESTERN CASUALTY AND SURETY COMPANY, of Fort Scott, Kansas
and
THE WESTERN FIRE INSURANCE COMPANY, of Fort Scott, Kansas

(Each a stock insurance company, herein called the company)

Severally agree with the insured, named in the declaration made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy, provided The Western Casualty and Surety Company, shall be the insurer with respect to coverages A, B and C and no other and The Western Fire Insurance Company shall be the insurer with respect to coverages D, E-1, E-2, F, G-1, H, I and J and no other:

INSURING AGREEMENTS

I Coverage A—Bodily Injury Liability

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, caused by accident and arising out of the ownership, maintenance or use of the automobile

Coverage B—Property Damage Liability

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of the automobile.

Coverage C—Medical Payments

To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, ambulance, hospital, professional nursing and funeral services, to or for each person who sustains bodily injury, sickness or disease, caused by accident, while in or upon, entering or alighting from the automobile if the automobile is being used by the named insured or with his permission.

Coverage D—Comprehensive Loss of or Damage to the Automobile, Except by Collision or Upset

To pay for any direct and accidental loss of or damage to the automobile, hereinafter called loss, except loss caused by collision of the automobile with another object or by upset of the automobile or by collision of the automobile with a vehicle to which it is attached. Breakage of glass and loss caused by missiles, falling objects, fire, theft, explosion, earthquake, windstorm, hail, water, flood, vandalism, riot or civil commotion shall not be deemed loss caused by collision or upset.

Coverage E-1—Collision or Upset

To pay for direct and accidental loss of or damage to the automobile, hereinafter called loss, caused by collision of the automobile with another object or by upset of the automobile.

Coverage E-2—Convertible Collision or Upset

To pay for direct and accidental loss of or damage to the automobile, hereinafter called loss, caused by collision of the automobile with another object or by upset of the automobile Upon the occurrence of the first loss for which payment is sought hereunder the insured shall pay to the company the additional payment stated in the declarations. Loss caused by collision or upset occurring prior to the first loss for which payment is sought hereunder is not covered.

Coverage F—Fire, Lightning and Transportation

To pay for direct and accidental loss of or damage to the automobile, hereinafter called loss, caused (a) by fire or lightning, (b) by smoke or smudge due to a sudden, unusual and faulty operation of any fixed heating equipment serving the premises in which the automobile is located, or (c) by the stranding, sinking, burning, collision or derailment of any conveyance in or upon which the automobile is being transported on land or on water.

Coverage G-1—Theft (Broad Form)

To pay for loss of or damage to the automobile, hereinafter called loss, caused by theft, larceny, robbery or pilferage.

Coverage H—Windstorm, Earthquake, Explosion, Hail or Water

To pay for direct and accidental loss of or damage to the automobile, hereinafter called loss, caused by windstorm, hail, earthquake, explosion, external discharge or leakage of water except loss resulting from rain, snow or sleet.

Coverage I—Combined Additional Coverage (including Malicious Mischief and Vandalism)

To pay for direct and accidental loss of or damage to the automobile, hereinafter called loss, caused by windstorm, hail, earthquake, explosion, riot or civil commotion, or the forced landing or falling of any aircraft or of its parts or equipment, flood or rising waters, external discharge or leakage of water (except loss resulting from rain, snow or sleet) or malicious mischief or vandalism, except that $25 shall be deducted from the amount of each determined loss resulting from malicious mischief or vandalism.

Coverage J Towing and Labor Costs

To pay for towing and labor costs necessitated by the disablement of the automobile, provided the labor is performed at the place of disablement

II Defense, Settlement, Supplementary Payments

As respects the insurance afforded by the other terms of this policy under coverages A and B this company shall

(a) defend any suit against the insured alleging such bodily injury, sickness, disease or property damage and seeking damages which are payable under the terms of this policy, even if any of the allegations of the suit are groundless, false or fraudulent, but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient,

(b) pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, the cost of bail bonds required of the insured in the event of accident or traffic law violation during the policy period, not to exceed the usual charges of surety companies nor $100 per bail bond, but without any obligation to apply for or furnish any such bonds

(c) pay all expenses incurred by the company all costs taxed against the insured in any such suit and all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon

(d) pay expenses incurred by the insured for such immediate medical and surgical relief to others as shall be imperative at the time of the accident

(e) reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the company's request

The amounts incurred under this insuring agreement, except settlements of claims and suits, are payable by the company in addition to the applicable limit of liability of this policy

III Definition of Insured

With respect to the insurance for bodily injury liability and for property damage liability the unqualified word "insured" includes the named insured and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission The insurance with respect to any person or organization other than the named insured does not apply:

(a) to any person or organization, or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency, service station or public parking place, with respect to any accident arising out of the operation thereof, but this exclusion does not apply to a member of the same household as the named insured or to a partner, agent or employee of either;

(b) to any employee with respect to injury to or sickness, disease or death of another employee of the same employer injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such employer

IV Automobile Defined, Trailers, Two or More Automobiles, Including Automatic Insurance

(a) Automobile. Except where stated to the contrary, the word "automobile" means

(1) Described Automobile the motor vehicle or trailer described in this policy,

(2) Utility Trailer under coverages A, B and C, a trailer not so described, if designed for use with a private passenger automobile, if not being used with another type automobile and if not a home, office, store, display or passenger trailer;

(3) Temporary Substitute Automobile—under coverages A, B and C, an automobile not owned by the named insured while temporarily used as the substitute for the described automobile while withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction;

(4) Newly Acquired Automobile—an automobile, ownership of which is acquired by the named insured who is the owner of the described automobile, if the named insured notifies the company within thirty days following the date of its delivery to him, and if either it replaces an automobile described in this policy or the company insures all automobiles owned by the named insured at such delivery date, but the insurance with respect to the newly acquired automobile does not apply to any loss against which the named insured has other valid and collectible insurance. The named insured shall pay any additional premium required because of the application of the insurance to such newly acquired automobile

The word "automobile" also includes under coverages D, E-1, E-2, F, G-1, H and I its equipment and other equipment permanently attached thereto.

(b) Semitrailer. The word "trailer" includes semitrailer.

(c) Two or More Automobiles When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each, but a motor vehicle and a trailer or trailers attached thereto shall be held to be one automobile as respects limits of liability under coverages A and B and separate automobiles as respects limits of liability, including any deductible provisions, under coverages D, E-1, E-2, F, G-1, H, I and J.

V Use of Other Automobiles

If the named insured is an individual who owns the automobile classified as "pleasure and business" or husband and wife either or both of whom own said automobile, such insurance as is afforded by this policy for bodily injury liability, for property damage liability and for medical payments with respect to said automobile applies with respect to any other automobile, subject to the following provisions:

(a) With respect to the insurance for bodily injury liability and for property damage liability the unqualified word "insured" includes (1) such named insured, (2) the spouse of such individual if a resident of the same household and (3) any other person or organization legally responsible for the use by such named insured or spouse of an automobile not owned or hired by such other person or organization Insuring Agreement III, Definition of Insured, does not apply to this insurance.

(b) This insuring agreement does not apply.

(1) to any automobile owned by, hired as part of a frequent use of hired automobiles by, or furnished for regular use to the named insured or a member of his household other than a private chauffeur or domestic servant of the named insured or spouse,

(2) to any automobile while used in the business or occupation of the named insured or spouse except a private passenger automobile operated or occupied by such named insured, spouse, chauffeur or servant,

(3) to any accident arising out of the operation of an automobile repair shop, public garage, sales agency, service station or public parking place,

(4) under coverage C, unless the injury results from the operation of such other automobile by such named insured or spouse or on behalf of either by such chauffeur or servant, or from the occupancy of said automobile by such named insured or spouse

VI Loss of Use by Theft—Rental Reimbursement

The company following a theft covered under this policy, shall reimburse the named insured for expense not exceeding $5 for any one day for totaling more than $150 or the actual cash value of the automobile at time of theft whichever is less, incurred for the rental of a substitute automobile including taxicabs

Reimbursement is limited to such expense incurred during the period commencing seventy two hours after such theft has been reported to the company and the police and terminating regardless of expiration of the policy period on the date the whereabouts of the automobile becomes known to the named insured or the company or on such earlier date as the company makes or tenders settlement for such theft

Such reimbursement shall be made only if the stolen automobile was a private passenger automobile not used as a public or livery conveyance and not owned and held for sale by an automobile dealer.

VII General Average and Salvage Charges

The company with respect to such transportation insurance as is afforded by this policy shall pay any general average and salvage charges for which the named insured becomes legally liable.

VIII Policy Period, Territory, Purposes of Use

This policy applies only to accidents which occur and to direct and accidental losses to the automobile which are sustained during the policy period while the automobile is within the United States of America its territories or possessions, Canada or Newfoundland is being transported between ports thereof, and is owned maintained and used for the purposes stated as applicable thereto in the declarations

EXCLUSIONS

This policy does not apply:

(a) under any of the coverages, while the automobile is used as a public or livery conveyance, unless such use is specifically declared and described in this policy and premium charged therefor;

(b) under coverages A, B and C, to liability assumed by the insured under any contract or agreement;

(c) under coverages A and B, while the automobile is used for the towing of any trailer owned or hired by the insured and not covered by like insurance in the company; or while any trailer covered by this policy is used with any automobile owned or hired by the insured and not covered by like insurance in the company;

(d) under coverages A and C, to bodily injury to or sickness, disease or death of any employee of the insured while engaged in the employment, other than domestic, of the insured or in domestic employment if benefits therefor are either payable or required to be provided under any workmen's compensation law;

(e) under coverage A, to any obligation for which the insured or any company as his insurer may be held liable under any workmen's compensation law;

(f) under coverage B, to injury to or destruction of property owned by, rented to, in charge of or transported by the insured;

(g) under coverage C, to bodily injury to or sickness, disease or death of any person if benefits therefor are payable under any workmen's compensation law;

(h) under coverages D, E-1, E-2, F, G-1, H, I and J, while the automobile is subject to any bailment lease, conditional sale, mortgage or other encumbrance not specifically declared and described in this policy;

(i) under coverages D, E-1, E-2, F, G-1, H and J, to loss due to war, whether or not declared, invasion, civil war, insurrection, rebellion or revolution or to confiscation by duly constituted governmental or civil authority;

(j) under coverages D, E-1, E-2, F, G-1, H, I and J, to any damage to the automobile which is due and confined to wear and tear, freezing, mechanical or electrical breakdown or failure, unless such damage is the result of other loss covered by this policy;

(k) under coverages D, E-1, E-2, F, G-1, H, I and J, to robes, wearing apparel or personal effects;

(l) under coverages D, E-1, E-2, F, G-1, H, I and J, to tires unless damaged by fire or stolen or unless such loss be coincident with other loss covered by this policy;

(m) under coverages D and G-1, to loss due to conversion, embezzlement or secretion by any person in lawful possession of the automobile under a bailment lease, conditional sale, mortgage or other encumbrance;

(n) under coverages E-1 and E-2, to breakage of glass if insurance with respect to such breakage is otherwise afforded;

(o) under coverage I, to loss which either in origin or extent is caused by war, invasion, civil war, insurrection, rebellion, revolution or other warlike operations (whether or not war be declared) or civil strife arising therefrom; nor, unless such liability be specifically assumed under this policy, for loss or damage caused by acts committed by the agent of any government, whether or not legally constituted, or by the agent of any party or faction engaged in any of the aforementioned warlike operations (whether or not war be declared) or civil strife arising therefrom, except that the foregoing is not intended to exclude loss or damage caused by explosion, where covered by this policy, unless such explosion occurs during and in connection with operations of military, naval or aerial armed forces.

ADDITION, SUBSTITUTION OR ELIMINATION OF AUTOMOBILE

(ALL COVER FORMS)

ADDITIONAL PREMIUM $ 15.00
RETURN PREMIUM $

The policy is hereby amended in the following particulars

DIVISION I — AUTOMOBILE ADDED

To afford insurance with respect to the automobile described in this Division, subject to all the terms of the policy except as specifically amended herein:

Description of the Automobile and Facts Respecting Its Purchase by the Named Insured:

Year of Model	Trade Name and Body Style	Model	Serial Number Motor Number	Number of Cylinders
1954	CHEVROLET 6 WHEEL TWO TON TRUCK		S 154F018590 M 0734876F548	

F.O.B. List Price or Delivered Price at Factory	Actual Cost When Purchased Including Equipment	Purchased		The automobile is unencumbered unless otherwise stated herein:			
		Month, Year	New or Used	Encumbrance	Installment Payments		Due Date and Amount of Final Installment
					Number	Amount of Each	
Rate Symbol & Age Group		M					
$	$ 3400.00	Y 7/54	NEW	$		$	$

Garage: The automobile will be principally garaged at the address stated into the policy otherwise stated herein:

Use: The purposes for which the automobile is to be used are:
[ ] Pleasure and Business; [XX] Commercial; as defined in Policy; or Class 50A

Loss Payee: Any loss under coverages of Comprehensive; Collision or Upset; Fire, Lightning and Transportation; Theft (Broad Form); Windstorm, Hail, Earthquake or Explosion; or Combined Additional Coverage is payable as interest may appear to the named insured and

NAME AND ADDRESS

DIVISION II — AUTOMOBILE ELIMINATED

To discontinue insurance with respect to the automobile described in this Division:

Year of Model	Trade Name	Model	Serial Number Motor Number
1948	G. M. C.	F0304	S 20201 M A24856220

DIVISION III

The insurance afforded for the added automobile is only with respect to such and so many of the following coverages as are designated "Yes" opposite the coverage desired. The limit of the company's liability against each such coverage shall be as stated herein, subject to all of the terms of this policy having reference thereto:

LIMITS OF LIABILITY	COVERAGES Designate each to be effective, "Yes"		Annual Prem. Per Added Automobile	PREMIUM ADDITIONAL	PREMIUM RETURN
10 thousand dollars each person 20 thousand dollars each accident	Bodily Injury Liability	( )	$	$ UNCHANGED	
10 thousand dollars each accident	Property Damage Liability	( )	$	$	$
$ each person	Medical Payments	( )	$	$	$
$ each insured	Extended Medical Payments	( )	$	$	$
Actual Cash Value or Amount Stated $	Comprehensive	( )	$	$	$
Actual Cash Value Less $ 100.00 Deductible	Collision or Upset	( )	$ 32.00	$ 8.00	$
Actual Cash Value or Amount Stated $ ACTUAL CASH VALUE	Fire, Lightning and Transportation	( )	$ 14.00	$ 7.00	$
	Theft (Broad Form)	( )	$ INCLUDED	INCLUDED	
	Windstorm, Hail, Earthquake or Explosion	( )	$	$	$
	Combined Additional Coverage	( )	$	$	$
$10 for each disablement	Towing and Labor Costs	( )	$	$	$
			$	$	$
			$	$	$
Rate Class	Rate Territory		Totals	$ 15.00	$

All other terms, limits and provisions of this policy remain unchanged

Attached to and made a part of Policy No. III 518973 of The Western Casualty and Surety Company, and/or Western Fire Insurance Company, of Fort Scott, Kansas.

Issued to Wm. S. CACKOS, SODA SPRINGS, IDAHO
Name of Insured City State

Endorsement Effective JULY 22, 1954

W. L. Gench

CONDITIONS

The conditions, except conditions 1 to 19 inclusive, apply to all coverages

Conditions 1 to 19 inclusive apply only to the coverage or coverages noted thereunder.

1. Notice of Accident
Coverages A, B and C

When an accident occurs written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the accident, the names and addresses of the injured and of available witnesses.

2. Notice of Claim or Suit
Coverages A and B

If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

3. Limits of Liability
Coverage A

The limit of bodily injury liability stated in the declarations as applicable to "each person" is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by one person in any one accident; the limit of such liability stated in the declarations as applicable to "each accident" is, subject to the above provision respecting each person, the total limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by two or more persons in any one accident.

4. Limit of Liability
Coverage C

The limit of liability for medical payments stated in the declarations as applicable to "each person" is the limit of the company's liability for all expenses incurred by or on behalf of each person who sustains bodily injury, sickness or disease, including death resulting therefrom, in any one accident.

5. Limits of Liability
Coverages A, B and C

The inclusion herein of more than one insured shall not operate to increase the limits of the company's liability.

6. Action Against Company
Coverages A and B

No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the company as a codefendant in any action against the insured to determine the insured's liability.

Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations hereunder.

7. Action Against Company
Coverage C

No action shall lie against the company unless as a condition precedent thereto, there shall have been full compliance with all the terms of this policy, nor until thirty days after the required proofs of claim have been filed with the company.

8. Financial Responsibility Laws
Coverages A and B

Such insurance as is afforded by this policy for bodily injury liability or property damage liability shall comply with the provisions of the motor vehicle financial responsibility law of any state or province which shall be applicable with respect to any such liability arising out of the ownership, maintenance or use of the automobile during the policy period, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. The insured agrees to reimburse the company for any payment made by the company which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.

9. Assault and Battery
Coverages A and B

Assault and battery shall be deemed an accident unless committed by or at the direction of the insured.

10. Medical Reports; Proof and Payment of Claim
Coverage C

As soon as practicable the injured person or some one on his behalf shall give to the company written proof of claim, under oath if required, and shall, after each request from the company, execute authorization to enable the company to obtain medical reports and copies of records. The injured person shall submit to physical examination by physicians selected by the company when and as often as the company may reasonably require.

The company may pay the injured person or any person or organization rendering the services and such payment shall reduce the amount payable hereunder for such injury. Payment hereunder shall not constitute admission of liability of the insured or, except hereunder, of the company.

11. Named Insured's Duties When Loss Occurs
Coverages D, F-1, F-2, F, G-1, H, I and J

When loss occurs, the named insured shall:

(a) protect the automobile, whether or not the loss is covered by this policy, and any further loss due to the named insured's failure to protect shall not be recoverable under this policy; reasonable expense incurred in affording such protection shall be deemed incurred at the company's request;

(b) give notice thereof as soon as practicable to the company or any of its authorized agents and also, in the event of theft, larceny, robbery or pilferage, to the police but shall not, except at his own cost, offer or pay any reward for recovery of the automobile;

(c) file proof of loss with the company within sixty days after the occurrence of loss, unless such time is extended in writing by the company, in the form of a sworn statement of the named insured setting forth the interest of the named insured and of all others in the property affected, any encumbrances thereon, the actual cash value thereof at time of loss, the amount, place, time and cause of such loss, the amount of rental or other expense for which reimbursement is provided under this policy, together with original receipts therefor, and the description and amounts of all other insurance covering such property.

Upon the company's request, the named insured shall exhibit the damaged property to the company and submit to examinations under oath by anyone designated by the company, subscribe the same and produce for the company's examination all pertinent records and sales invoices, or certified copies if originals be lost, permitting copies thereof to be made, all at such reasonable times and places as the company shall designate.

12. Appraisal
Coverages D, F-1, F-2, F, G-1, H, I and J

If the named insured and the company fail to agree as to the amount of loss, each shall, on the written demand of either, made within sixty days after receipt of proof of loss by the company, select a competent and disinterested appraiser, and the appraisal shall be made at a reasonable time and place. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on the request of the named insured or the company, such umpire shall be selected by a judge of a court of record in the county and state in which such appraisal is pending. The appraisers shall then appraise the loss, stating separately the actual cash value at the time of loss and the amount of loss, and failing to agree shall submit their differences to the umpire. An award in writing of any two shall determine the amount of loss. The named insured and the company shall each pay his or its chosen appraiser and shall bear equally the other expenses of the appraisal and umpire.

The company shall not be held to have waived any of its rights by any act relating to appraisal.

13. Limit of Liability; Settlement Options; No Abandonment
Coverages D, F-1, F-2, F, G-1, H, I and J

The limit of the company's liability for loss shall not exceed the actual cash value of the automobile or if the loss is of a part thereof the actual cash value of such part at time of loss nor what it would then cost to repair or replace the automobile or such part thereof with other of like kind and quality, with deduction for depreciation, nor the applicable limit of liability stated in the declarations.

The company may pay for the loss in money or may repair or replace the automobile or such part thereof, as aforesaid, or may return any stolen property with payment for any resultant damage thereto at any time before the loss is paid or the property is so replaced, or may take all or such part of the automobile at the agreed or appraised value but there shall be no abandonment to the company.

14. Payment for Loss; Action Against Company
Coverages D, F-1, F-2, F, G-1, H and I

Payment for loss may not be required nor shall action lie against the company unless, as a condition precedent thereto, the named insured shall have fully complied with all the terms of this policy nor until thirty days after proof of loss is filed and the amount of loss is determined as provided in this policy.

15. No Benefit to Bailee
Coverages D, F-1, F-2, F, G-1, H, I and J

The insurance afforded by this policy shall not enure directly or indirectly to the benefit of any carrier or bailee liable for loss to the automobile.

(CONTINUED ON FOLLOWING PAGE)

(CONTINUED FROM PRECEDING PAGE)

16. Assistance and Cooperation of the Insured
Coverages A, B, D, E-1, E-2, F, G-1, H, I and J

The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

17. Subrogation
Coverages A, B, D, E-1, E-2, F, G-1, H, I and J

In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.

18. Other Insurance
Coverages A, B, D, E-1, E-2, F, G-1, H, I and J

If the insured has other insurance against a loss covered by this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance with respect to temporary substitute automobiles under Insuring Agreement IV or other automobiles under Insuring Agreement V shall be excess insurance over any other valid and collectible insurance available to the insured, either as an insured under a policy applicable with respect to said automobiles or otherwise.

19. Other Insurance
Coverage C

The insurance afforded with respect to other automobiles under Insuring Agreement V shall be excess insurance over any other valid and collectible medical payments insurance applicable thereto

20. Changes Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy.

21. Assignment Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon; if, however, the named insured shall die or be adjudged bankrupt or insolvent within the policy period, this policy, unless canceled, shall, if written notice be given to the company within sixty days after the date of such death or adjudication, cover (1) the named insured's legal representative as the named insured, and (2) under coverages A and B, subject otherwise to the provisions of Insuring Agreement III, any person having proper temporary custody of the automobile, as an insured, and under coverage C while the automobile is used by such person, until the appointment and qualification of such legal representative but in no event for a period of more than sixty days after the date of such death or adjudication.

22. Cancelation This policy may be canceled by the named insured by surrender thereof or by mailing to the company written notice stating when thereafter such cancelation shall be effective. This policy may be canceled by the company by mailing to the named insured at the address shown in this policy written notice stating when not less than ten days thereafter such cancelation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice and the effective date and hour of cancelation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the named insured or by the company shall be equivalent to mailing.

If the named insured cancels, earned premiums shall be computed in accordance with the customary short rate table and procedure. If the company cancels, earned premiums shall be computed pro rata. Premium adjustment may be made at the time cancelation is effected and, if not then made, shall be made as soon as practicable after cancelation becomes effective. The company's check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the named insured.

23. Terms of Policy Conformed to Statute Terms of this policy which are in conflict with the statutes of the State wherein this policy is issued are hereby amended to conform to such statutes.

24. Declarations By acceptance of this policy the named insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance.

In Witness Whereof, The Western Casualty and Surety Company has caused this policy, with respect to coverages A, B and C and such other parts of the policy as are applicable thereto, to be executed and attested, but this policy shall not be valid unless countersigned on the declarations page by a duly authorized agent of the company

E. L. Gordon — Secretary

Kay B. Wilson — President.

In Witness Whereof, The Western Fire Insurance Company has caused this policy, with respect to coverages D, E-1, E-2, F, G-1, H, I and J and such other parts of the policy as are applicable thereto, to be executed and attested, but this policy shall not be valid unless countersigned on the declarations page by a duly authorized agent of the company.

E. L. Gordon — Secretary

Kay B. Wilson — President.

Ed. February 1951

TEXAS EXCEPTION—If this policy is issued in or the insured is a resident of Texas or the insurance afforded applies while the automobile is in the State of Texas, (1) the word "sixty" in Condition 11 (c), Insured's Duties When Loss Occurs, shall read "ninety-one"; and when loss occurs, the insured shall file proof of loss with the company within ninety-one days after the occurrence of loss; and (2) under the Insuring Agreements, Coverage I, Combined Additional Coverage (including Malicious Mischief and Vandalism), is amended by deleting any coverage with respect to Malicious Mischief and Vandalism; policy Exclusion (i) is amended to apply also to Coverage I and policy Exclusion (o) is deleted in its entirety; and (3) the cancelation of this policy is subject to the exceptions as provided in the Texas Automobile Insurance Manual.

KANSAS ENDORSEMENT

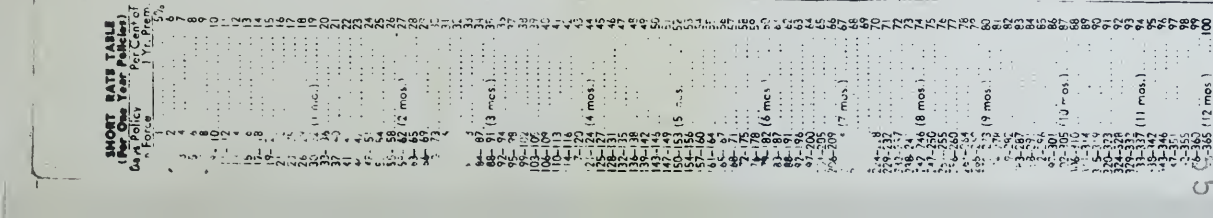
(In case this policy is written in the State of Kansas, the following applies.)

Conditions No. 11(a) and No. 12 of this policy are hereby amended as follows, all other terms and conditions remaining unchanged:

Condition No. 11(a)—Substitute the following for the entire paragraph: (a) use every reasonable means to protect the automobile covered by this policy from any further loss; reasonable expense incurred in affording such protection shall be deemed incurred at the company's request.

Condition No. 12 ... words "made within thirty days after receipt of proof of loss by the company" are substituted for the words "made within sixty days after receipt of proof of loss by the company" as they appear in this condition

All other provisions of Condition No. 12 remain unchanged.



(Copy) March 30, 1955
Western Casualty Company
Fort Scott, Kansas

Through:
O. R. Baum,
Attorney at Law,
Carlson Building,
Pocatello, Idaho.

Re: Campbell vs. C. H. Elle Construction Co., Gagon, et al.

Gentlemen:

On February 28, 1955, there was filed an action in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock, entitled Mary Lou Campbell and Terrell Ray Campbell and Curtis Howard Campbell, Minors, by their Guardian Ad Litem, Mary Lou Campbell, plaintiffs, vs. C. H. Elle Construction Co., a corporation, M. Burke Horsley, Max Larsen, and W. S. Gagon, defendants.

This action grows out of an accident on August 22, 1954, in the vicinity of Soda Springs, Idaho, involving one Arnold Campbell, now deceased, driver of one of the vehicles, and a 1954 Chevrolet Truck owned by W. S. Gagon, and driven by M. Burke Horsley, an employee of C. H. Elle Construction Co. C. H. Elle Construction Co., and its employees are insured by St. Paul-Mercury Indemnity Company, who have engaged us to protect their interest in the matter.

It is our understanding that W. S. Gagon carried

automobile and liability insurance covering the 1954 Chevrolet Truck with the Western Casualty Company.

On behalf of the C. H. Elle Construction Company, we hereby notify you that C. H. Elle Construction Company claims protection as an additional insuree under the policy of W. S. Gagon, and, therefore, defense of the above-described action is hereby tendered to the Western Casualty Company as insurance carrier of the said W. S. Gagon.

Please be further advised that in view of the necessity of filing appearance to avoid default against C. H. Elle Construction Company, M. Burke Horsley and Max Larsen, we have filed on behalf of each, a separate demurrer and motion to strike.

The above notification and tender of defense is written confirmation of the oral notification and tender heretofore presented to O. R. Baum, attorney at law, Pocatello, Idaho, as the attorney for W. S. Gagon and Western Casualty in the above-entitled action.

Sincerely yours,

MERRILL & MERRILL,

By .....

WFM:lr

2983-C

Notice of Policy Under Section 5 of Idaho Motor Vehicle Safety Responsibility Act.

Date of accident: August 22, 1954. Place of accident: Highway 30, 3 Miles West of Soda Springs, Idaho.

Description of Vehicle involved in accident: Year or Model: 1954. Trade Name: Chevrolet. Model and Body type: 6 wheel 2 ton truck. Serial No. K54F018590. Motor No. 9734876F54H.

Vehicle operated by Burke Horsley, Soda Springs, Idaho and owned by Wm. S. Gagon, Soda Springs, Idaho.

The company signatory hereto gives notice that its policy numbered UI 518973 issued to Wm. S. Gagon, Soda Springs, Idaho, is an automobile liability policy affording limits of $5,000/$10,000 bodily injury and $1,000 property damage, which policy was in effect on the date of the above described accident.

Does this policy apply to the above owner: Yes (x) No ( )

Does this policy apply to the above operator: Yes (x) No ( )

The Western Casualty & Surety Co., Fort Scott, Kansas.

American Agencies, Inc.
General Agents.
/s/ By A. W. McKay,
Secretary.

Date: Oct. 5, 1954.

(Reverse Side)

List drivers of any other vehicles involved in the accident: Arnold Campbell, Soda Springs, Idaho.

[Endorsed]: Filed November 1, 1956.

[Title of District Court and Cause.]

RESPONSE TO REQUEST FOR ADMISSIONS

The defendant makes the following admissions and denials on the request for admission served on the defendant on the 1st day of November, 1956, by C. H. Elle Construction Co., a corporation, and St. Paul-Mercury Indemnity Co., a corporation, the plaintiffs:

Request I

(a) Defendant admits I-a.

(b) Defendant states that the copy of the document referred to in I-b served on defendant is not legible and defendant has no knowledge or information concerning the instrument and therefore denies the request.

Request II

(a) That the said policy referred to was issued to W. S. Gagon and referred to a 1954 Chevrolet truck under the terms and conditions set forth in said policy and not otherwise.

(b) Defendant admits that on the 22nd day of August, 1954, the said policy of insurance, in accordance with its terms, had been issued and not cancelled.

(c) Admits II-c.

(d) Admits II-d.

(e) Answering II-e, defendant states that the said M. Burke Horsley was an employee of C. H. Elle Construction Company and was in the line,

scope and course of his employment as an employee of the C. H. Elle Construction Company.

(f) Defendant admits the statements contained therein, and states that the said William S. Gagon was made a party defendant under certain conditions and that the said complaint in such action alleged that the said M. Burke Horsley was driving said truck with the permission of the said William S. Gagon, which fact was denied by the said defendant and was likewise denied by the said plaintiffs herein, and that the said jury exonerated the said William S. Gagon from any liability growing out of said accident.

(g) Answering II-g, defendant admits the same and further states that the said judgment entered in said action was in favor of the said William S. Gagon and against C. H. Elle Construction Company and M. Burke Horsley as stated in said paragraph, a copy of which said judgment is hereto attached and made a part hereof as fully and completely as if copied herein at length.

(h) Answering II-h, defendant admits that the said policy contains paragraph as numbered, but states that the policy contained many other provisios, and that said paragraph contained only a part of the terms and conditions of said policy and that the quoted provisions of said policy, together with the other provisions in said policy are inapplicable in the present action and that the permissive use referred to in the first section of the quoted paragraph in Request II-h has already been decided adversely to the plaintiffs in the action in the Dis-

trict Court of the Fifth Judicial District of the State of Idaho in and for the County of Bannock.

(i) Answering Request II-i, defendant admits that a demand was made as stated in said letter dated March 30, 1955, but states that under the coverage contract held by William S. Gagon no one except the named insured could give permission for the truck to be used and the coverage apply, and the said O. R. Baum, as attorney for the defendant, so advised the said counsel for the said plaintiffs herein.

(j) Answering Request II-j, defendant states that the furnishing of SR-21, if one was filed, is not evidence of permissive use of the vehicle described herein nor as to any statutory obligation on the part of this defendant; that the copy referred to in said Request II-j which was served upon the defendant is illegible and is attached hereto for the Court's consideration.

(k) Answering Request II-k, defendant states that it is unable to state whether or not the statements so purported to be in the said SR-21 are in accordance with the facts, and states that the named insured in said policy never gave permission for the truck to be used and that the said purported SR-21, if one was filed, should not have been filed and that there was no requirement under the provisions of the statute of the State of Idaho and under the conditions under which said truck was being used for such a form to be filed, if one was filed.

(l) Answering Request II-l, defendant objects to the admission sought by said request II-l as be-

ing irrelevant and immaterial, but if the court finds that it is states that the statement as made in such request is not the true fact but states that William S. Gagon was the named insured in said policy referred to and that the named insured was never contacted for permission to use the said truck and never gave permission that said truck could be used, and further states that if the request had been made to the named insured for the use of the truck for the use to which it was put such request would have been denied; that on the day in question the said M. Burke Horsley, being unable to locate the said named insured, went to the home of the said named insured and there requested permission of his wife, Jessie Gagon, and that she turned the keys over to the said M. Burke Horsley; that at said time and place the said Jessie Gagon was not acting as an agent or servant or employee of William S. Gagon, nor acting for or on behalf of the community; that in the action in the state court, as heretofore referred to, the plaintiff alleged that the said truck was being driven with the permission of the said named insured and the jury found contrary to such statement, and the said plaintiffs herein denied that said truck was being used with the permission of the said William S. Gagon.

(m) Answering Request 11-m, the defendant objects upon the ground that the state of facts sought to be admitted is irrelevant and immaterial.

(n) Answering Request II-n, defendant admits the same.

(o) Answering Request II-o, defendant admits that Jessie Gagon works on the books of said business conducted by the said William S. Gagon, but denies that the said business referred to was operated by the said William S. Gagon and Jessie Gagon, and states that the said William S. Gagon operated a lumber business, and states that the said Jessie Gagon was without authority and was not the agent, servant or employee of the said William S. Gagon in authorizing the use of the vehicle referred to herein by M. Burke Horsley.

(p) Answering Request II-p, defendant states that the said matters sought to be admitted are irrelevant and immaterial, and states that if the Court finds that they are not, then defendant admits that said truck was under the control and supervision of said named insured William S. Gagon when used in his business.

O. R. BAUM,
RUBY Y. BROWN,
BEN PETERSON,
Attorneys for Defendant.

Duly Verified.

[Note: Notice of Policy Under Section 5 of Idaho Motor Vehicle Safety Responsibility Act is the same as set out at pages 58-59 of this printed record. Order dated December 28, 1955 and signed by Henry McQuade, District Judge is set out at pages 40-41.]

[Endorsed]: Filed November 9, 1956.

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS

Defendant hereby requests the plaintiffs to make the following admissions for the purpose of the within action only, within 10 days after service of this request:

I.

That the documents exhibited with this request are genuine, to wit:

Saint Paul-Mercury Indemnity Company, Multiple Coverage Policy No. 6210145, and The Riders and Insurance Agreement,

copies of which are hereto attached, and insured the C. H. Elle Construction Company against any loss by reason of bodily injury.

II.

That each of the following statements is true:

(a) That the said policy noted above insured C. H. Elle Construction Company and the said insurance company agreed to pay on behalf of the said insured C. H. Elle Construction Company all sums which insured became obligated to pay by reason of the liability imposed upon the insured by law.

(b) That on the 22nd day of August, 1954, the above policy of insurance was in effect and payment of the judgment in the case of Mary Lou Campbell, et al., vs. C. H. Elle Construction Co., et al., was made by said plaintiff herein, St. Paul-Mercury

Indemnity Company under and by virtue of the insuring provisions of said policy.

(c) That M. Burke Horsley was employed by the C. H. Elle Construction Company, and at the time of said accident or collision was in the line, course and scope of his employment as such employee.

(d) That in the action entitled Mary Lou Campbell et al., vs. C. H. Elle Construction Company, et al., judgment was rendered in favor of the plaintiffs and against the C. H. Elle Construction Company, the named insured of the plaintiff herein, and against M. Burke Horsley, the named insured's agent, servant and employe, and judgment was against the plaintiffs and in favor of the defendant William S. Gagon, he being a defendant in said cause, and said complaint alleging that the 1954 Chevrolet truck was being operated by M. Burke Horsley with the consent and permission of William S. Gagon.

(e) That the said C. H. Elle Construction Company in the said action referred to in the preceding paragraph denied that said 1954 Chevrolet truck was being operated with the permission of the said William S. Gagon, by and through its present counsel of record, Merrill and Merrill.

(f) That after the rendition of said judgment in said action wherein Mary Lou Campbell et al. were plaintiffs and C. H. Elle Construction Company, et al., were defendants, the judgment so rendered against the said defendants C. H. Elle Construction

Company and M. Burke Horsley was paid by the said plaintiff St. Paul-Mercury Indemnity Co., a corporation, without consultation of or notice to the said defendant herein.

III.

That the said policy of insurance issued by the St. Paul-Mercury Indemnity Company contained the following provision:

> "The Company agrees to pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law * * *"

IV.

That the C. H. Elle Construction Company and the plaintiff St. Paul-Mercury Indemnity Company filed a document designated as SR-21, pursuant to the provisions of the statutes of the State of Idaho, namely, Sec. 5, Idaho Motor Vehicle Safety Responsibility Act, and that it was signed on behalf of said plaintiff St. Paul-Mercury Indemnity Company.

V.

That the named insured in said policy issued to said William S. Gagon was William S. Gagon only.

VI.

That the policy of insurance issued to William S. Gagon, namely, Policy No. Ui 518973, issued by the Western Casualty and Surety Company, a corporation, contained the following coverage:

"To pay on behalf of the insured all sums

which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, * * *"

VII.

That the judgment in the said action filed in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock, was in favor of the plaintiffs and against the defendants C. H. Elle Construction Company and M. Burke Horsley, and was in favor of the defendant William S. Gagon, and in the same action, and that an ascertainment was had therein that the said William S. Gagon was not legally obligated to pay any damages.

VIII.

That in the said action referred to and filed in the District Court of the Fifth Judicial District of the State of Idaho, the only person who became obligated by law to pay any sums of money to the plaintiffs was the said C. H. Elle Construction Company, and that the St. Paul-Mercury Indemnity Company paid said judgment.

IX.

That the said firm of Merrill & Merrill, Attorneys at Law, defended the said C. H. Elle Construction Company and the said M. Burke Horsley at the request of the said St. Paul-Mercury Indemnity Company, one of the plaintiffs herein.

X.

That the plaintiff, St. Paul-Mercury Indemnity Company, through its counsel, directed the defense of the said action so filed in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock, and that the same counsel appeared for C. H. Elle Construction Company in the action filed in the District Court of the State of Idaho as appears in the present action for each of the said plaintiffs.

Dated this 6th day of November, 1956.

/s/ O. R. BAUM,
/s/ RUBY Y. BROWN,
/s/ BEN PETERSON,
Attorneys for Defendant.

Acknowledgment of Service Attached.

SAINT PAUL-MERCURY INDEMNITY COMPANY

St. Paul, Minnesota
A Capital Stock Company
Daily Report

Multiple Coverage Policy

Policy No. 6210145, Deposit Premium $1,297.47.

Issued to C. H. Elle Construction Company, 390 Yellowstone Avenue, Alameda, Bannock Co., Idaho.

The Saint Paul-Mercury Indemnity Company (Herein referred to as the Company), in consideration of the payment of the agreed premium(s) and subject to the terms of this Policy and its Insuring

Agreements, Agrees to Indemnify or Pay to or on Behalf of the Insured in Accordance With Such Insuring Agreements, With Respect to the Occurrence of Any of the Therein Mentioned Casualties or Events During the Policy Period.

General Conditions

1. Policy Period — The Policy Period with respect to any Insuring Agreement shall begin at 12:01 A. M. on the date stated in such Insuring Agreement and ends at noon of the effective date of the cancellation of this policy as an entirety or the cancellation of such Insuring Agreement, as hereinafter provided, whichever cancellation shall first occur. If, subsequent to the date hereof, any Insuring Agreement is made a part of this policy by mutual agreement, then the Policy Period with respect to such Insuring Agreement shall begin on the date stated therein, and if, prior to the cancellation of this policy as an entirety, any Insuring Agreement is terminated, as hereinafter provided then noon of the effective date of such termination shall be the end of the Policy Period with respect to such Insuring Agreement.

2. Limit of Liability—The limit(s) of the Company's liability as expressed in this Policy shall not be:

(a) cumulative from year to year, or period to period, regardless of the number of premiums paid or payable;

(b) increased by the inclusion herein of, or by reference herein to, more than one party in interest

as the Insured, the one first named being deemed the named Insured and authorized agent of and entitled to priority over the others for all purposes of this Policy, and if the named Insured ceases to be covered hereunder the one next named shall thereafter be deemed the named Insured;

(c) affected by the death of any Insured, nor shall the Company be relieved of any of its obligations hereunder by the death of an Insured or the bankruptcy or insolvency of an Insured or an Insured's estate.

3. Ownership of Insured Property—The money, securities, and other property covered by this Policy may be owned by the Insured, or held by the Insured in any capacity whether or not the Insured is liable for the loss thereof, or held by others provided the Insured is legally liable for loss thereof.

4. Termination of Prior Coverage—The Insured by the acceptance of this Policy, gives notice to the Company terminating or cancelling prior bonds or policies Numbers Nil. Such termination or cancellation to be effective as of the time this Policy and its Insuring Agreements become effective.

5. Insured's Duties When Loss Occurs — (a) Upon the occurrence of any casualty or event for which coverage is afforded by this Policy, written notice shall be given by or on behalf of the Insured to the Company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the Insured, and reasonably obtainable information respecting the time, place and circumstances of the casualty or event,

and the names and addresses of the injured and of available witnesses. If claim is made or suit is brought against the Insured, the Insured shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative.

(b) Upon request of the Company, the Insured shall, within a reasonable time after determining the amount of any loss, submit to the Company an itemized proof of loss, duly sworn to.

Countersigned at San Francisco, California, this 5th day of July, 1951.

P. F. McKOWN,
Resident Vice President,

By

6. Assistance and Cooperation of the Insured—The Insured shall cooperate (except in a pecuniary manner) with the Company and, upon the Company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The Insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of the casualty or event.

7. Subrogation and Salvage—(a) In the event of any payment under this Policy, the Company shall be subrogated to all the Insured's rights of recovery therefor against any person or organization, and the Insured shall execute and deliver instruments

and papers and do whatever else is necessary to secure such rights. The Insured shall do nothing after loss to prejudice such rights.

(b) Upon the payment of any loss by the Company all money or other property recovered on account of any loss, by whomsoever such recovery shall have been made, shall belong to the Company except that if any loss exceeds the limit of the Company's liability on account of such loss, the Insured shall be entitled to all recovery thereon until fully reimbursed for such excess loss.

8. Defense, Settlement, Supplementary Payments—As respects any insurance afforded by the terms of this Policy, the Company shall:

(a) defend in the name and on behalf of the Insured any suit against the Insured alleging injury, sickness or disease, damage or destruction, and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the Company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the Company;

(b) Pay all premiums on bonds to release attachments not in excess of the limits of liability of the Policy, or to effect appeals in such defended suit(s), or to guarantee the Insured's appearance in court if such appearance is required by reason of an accident or traffic violation arising out of use of an automobile with respect to which use insurance is afforded under this Policy, but without any obligation to apply for or furnish such bonds; all costs

taxed against the Insured in any such suits; all expenses incurred by the Company; all interest accruing after entry of judgment until the Company has paid, tendered or deposited in court such part of such judgment as does not exceed the limits of the Company's liability thereon; and expenses incurred by the insured in the event of bodily injury, sickness or disease, for such immediate medical and surgical relief to others as shall be imperative at the time of the casualty or event.

(c) reimburse the insured for all reasonable expenses incurred at the Company's request other than loss of earnings.

The Company agrees to pay the amounts incurred under this Section (8), except settlement of claims and suits, in addition to the applicable limits of liability expressed in any Insuring Agreement.

9. No Additional Premium — Payment by the Company of any obligation hereunder shall not entitle the Company to an additional or reinstatement premium unless otherwise stated in the Insuring Agreement providing for such payment.

10. Cancellation—This Policy as an entirety (including all Insuring Agreements) or any Insuring Agreement may be cancelled (a) by agreement between the Insured and the Company; or (b) by the Insured serving upon the Company written notice stating when thereafter such cancellation shall be effective; or (c) by the Company serving upon the Named Insured at the address shown in this Policy written notice, or sending such notice by registered mail, stating therein the date when such cancella-

tion shall be effective, but such date, if the notice be served, shall be not less than 30 days after such service, or if sent by registered mail, not less than 35 days after the date borne by the sender's registry receipt. The mailing of notice as aforesaid shall be sufficient proof of its delivery to the Insured. The unearned premium, if any, computed pro rata, if cancelled by the Company, or short rate if cancelled by the Insured shall be refunded as soon as practicable after cancellation becomes effective.

11. Other Insurance — No Insuring Agreement hereof shall apply to any loss if the Insured is, or would be but for the existence of such Insuring Agreement, insured against such loss under any other policy or policies, bond or bonds, except as respects any excess beyond the amount which would have been payable under any other such policy or policies, bond or bonds, had such Insuring Agreement not been effective.

12. Changes—No notice to any agent, or knowledge possessed by any agent or by any other person shall be held to effect a waiver or change in any part of this policy; nor shall the terms of this policy be waived or changed except by endorsement issued to form a part hereof, signed by the President, a Vice-President, a Secretary, or an Assistant Secretary of the Company.

13. Premium, Inspection and Audit — The premium for which this Policy is written shall be an estimated premium only. At the end of each annual period the earned premium shall be computed in

accordance with the rate agreed upon. If the earned premium, thus computed, exceeds the estimated premium paid, the Insured shall pay the excess to the company, if less, the company shall return to the Insured the unearned portion paid, subject, however, to the agreed upon annual minimum premium. The company shall be permitted, at all reasonable times, to inspect the Insured's premises, plants, works, machinery, elevators, appliances and operations and to examine and audit the Insured's books and records during the Policy Period, and within 3 (illegible) as they relate to the premium bases or the subject matter of the insurance granted by this Policy. The Insured shall (illegible) to the company submit reports of work completed, gross receipts from all operations and payroll expended.

14. Continuity of Prior Coverage—(a) The coverage of any Insuring Agreement shall, Unless Otherwise Stated in Such Insuring Agreement, apply to any loss occurring during the term of any prior bond or bonds or policy or policies of insurance, herein referred to as prior insurance, carried by the Insured, provided:

(1) such loss is one to which the coverage of such Insuring Agreement would have applied had the loss occurred during the effective period of such Insuring Agreement, and

(2) that such prior insurance had not terminated prior to the effective date of such Insuring Agreement, and

(3) that the period allowed for discovery of loss

under such prior insurance had elapsed prior to the discovery of such loss, and

(4) that the Company shall be liable for no more than the amount of coverage in effect under such prior insurance when the loss occurred, or the amount of insurance granted under this Policy, whichever is less.

(b) Where the period allowed for discovery of loss under any other Bond or Policy of insurance, herein referred to as prior insurance, issued by the Company to the Insured, had not elapsed at the time of the substitution of the coverage of this Policy for the coverage of such prior insurance, the Company's liability under this Policy and under such prior insurance shall not be cumulative as to any loss(es) (1) caused by any act(s) or omission(s) of any one person or act(s) or omission(s) in which such person is concerned or implicated, or (2) resulting from or in respect to any one casualty or event.

15. Valuations—For the purpose of any loss settlement the value of any securities shall be their quoted market value on the business day next preceding the discovery of the loss or at the time of the settlement of the loss whichever amount shall be the larger; and the value of any subscription, conversion, redemption or deposit privileges shall be their quoted market value immediately preceding the expiration thereof. If such securities or such privileges have no quoted market value, their value shall be determined by agreement or arbitration. In case

of any loss or destruction of, or damage to, any property insured hereby, other than securities, the Company shall not be liable for more than the actual cash value thereof, or for more than the actual cost of repairing such property or of replacing same with property or material of like quality or quantity or value. The Company may, at its option, pay such actual cash value, or make such repairs or replacements.

16. Assignment—No assignment of interest hereunder shall bind the Company without its written consent; but if any Insured shall die or be adjudged bankrupt or insolvent, any coverage granted hereunder shall cover such Insured's legal representative, in his capacity as such, as an Insured, with respect to any casualty or event covered by this Policy, provided that notice of such death or adjudication is given to the Company within 60 days after the date thereof.

17. Action Against Company—No action shall lie against the Company, unless as a condition precedent thereto, the Insured shall have fully complied with all of the terms of this Policy, nor until the amount of the Insured's obligation to pay shall have been finally determined either by judgment against the Insured after actual trial or by written agreement of the Insured, the claimant and the Company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this Policy to the extent of the insur-

ance afforded by this Policy. Nothing contained in this Policy shall give any person or organization any right to join the Company as a co-defendant in any action against the Insured to determine the Insured's liability.

18. Fraud and Misrepresentation — This Policy shall be void if the Insured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof or in case of any fraud, attempted fraud or false swearing by the Insured pertaining to this insurance or the subject thereof, whether before or after a loss. However, unintentional errors or omissions on the part of the Insured shall not operate to prejudice the rights of the Insured under this Policy.

19. Special Statutes—Any and all terms of this Policy which are in conflict with the statutes of any State in which coverage is granted are understood, declared and acknowledged by the Company to be amended to conform with such statutes.

In Witness Whereof, the Saint Paul-Mercury Indemnity Company has caused this Policy to be executed and attested, but this Policy and any Insuring Agreements or Riders shall not be valid unless signed by an officer or an agent or an Attorney-in-fact of the Company.

Rider No. VII

Applicable to the Comprehensive General and Automobile Liability Insuring Agreement.

It is agreed that the Limits of Liability are amended as follows:

A. Bodily Injury Liability Including automobile, $100,000.00 Each Person, $300,000.00 Each Occurrence, $300,000.00 Aggregate Products & completed Operations.

This Rider shall take effect on the 1st day of July, 1955.

Forming part of Policy No. 6210145 issued to C. H. Elle Construction Co. of Alameda, Idaho, by the St. Paul-Mercury Indemnity Insurance Company, St. Paul, Minn.

Not valid until countersigned by an officer or an agent or an attorney-in-fact of the Company.

Countersigned at Pocatello, Idaho this 5th day of July, 1955.

Turner Ins. Agency,

By .....

A. B. Jackson,

President.

Rider No. VI

Applicable to the Comprehensive General and Automobile Liability Insuring Agreement.

It is agreed that with respect to work performed by the Insured on the Bannock County Court House, Pocatello, Idaho, the limits are amended as follows:

Coverage — Bodily Injury (including Auto)— $100,000.00 Each Person, $200,000.00 Each Occurrence, $200,000.00 Aggregate Products & completed Operations.

This Rider shall take effect on the 8th day of December, 1953.

Forming part of Policy No. 6210145 issued to

C. H. Elle Construction Company of Alameda, Bannock Co., Idaho by the St. Paul-Mercury Indemnity Insurance Company, St. Paul, Minn.

Not valid until countersigned by an officer or an agent or an attorney-in-fact of the Company.

Countersigned at San Francisco, Calif. this 14th day of December, 1953.

P. F. McKown,
Resident Vice President,

By .....
A. B. Jackson,
President.

Rider No. V

Applicable to the Comprehensive General and Automobile Liability Insuring Agreement.

It is agreed that with respect to the work to be done by the Insured in connection with the following two jobs the Coverage A—Bodily Injury (except automobile) Limits of Liability are amended to read: $100,000.00 Each Person, $200,000.00 Each Occurrence, $200,000.00 Aggregate Products & completed Operations.

1) Green Acres School — Oak Street, Alameda, Idaho.

2) Lewis and Clark School—Alameda Road and McKinley, Alameda, Idaho.

This Rider shall take effect on the 28th day of April, 1953.

Forming part of Policy No. 6210145 issued to C. H. Elle Construction Company of Alameda, Bannock Co., Idaho by the St. Paul-Mercury Indemnity Insurance Company, St. Paul, Minn.

Not valid until countersigned by an officer or an agent or an attorney-in-fact of the Company.

Countersigned at San Francisco, Calif. this 12th day of May, 1953.

P. F. McKown,
Resident Vice President,

By .....
A. B. Jackson,
President.

Rider No. IV

Applicable to the Comprehensive General and Automobile Liability Insuring Agreement.

It is agreed that the restrictions imposed by Rider No. III of this Insuring Agreement shall not apply to the following vehicle or its replacement: 1952 Ford 2 Ton Dump Truck M# F6M-2KC2 517.

This Rider shall take effect on the 20th day of August, 1952.

Forming part of Policy No. 6210145 issued to C. H. Elle Construction Company of Alameda, Bannock Co., Idaho by the St. Paul-Mercury Indemnity Insurance Company, St. Paul, Minn.

Not valid until countersigned by an officer or an agent or an attorney-in-fact of the Company.

Countersigned at San Francisco, Calif. this 17th day of December, 1952.

P. F. McKown,
Resident Vice President,

By .....
A. B. Jackson,
President.

Rider No. III

Applicable to the Comprehensive General and Automobile Liability Insuring Agreement.

It is agreed that all coverage is excluded for work performed by the Insured at Mountain Home Air Force Base Defense Housing Project IDA-1-D-1 located Mountain Home, Idaho.

It is further agreed with respect to automobile coverage that only those vehicles specifically assigned to the Mountain Home Air Force Base Job are excluded.

/s/ .....

C. H. Elle Construction Co.

This Rider shall take effect on the 20th day of August, 1952.

Forming part of Policy No. 6210145 issued to C. H. Elle Construction Company of Alameda, Bannock Co., Idaho by the St. Paul-Mercury Indemnity Insurance Company, St. Paul, Minn.

Not valid until countersigned by an officer or an agent or an attorney-in-fact of the Company.

Countersigned at San Francisco, Calif. this 9th day of October, 1952.

P. F. McKown,
Resident Vice President,

By .....

A. B. Jackson,
President.

Rider No. II

Applicable to the Comprehensive General and Automobile Liability Insuring Agreement.

It is agreed that coverage is excluded for all lia-

bility arising out of the Insured's operations as a joint adventuror with Reynolds & Walker, Inc. on the Jerome Memorial Hospital Job in Jerome, Idaho.

/s/ .....
C. H. Elle Construction Co.

This Rider shall take effect on the 15th day of June, 1951.

Forming part of Policy No. 6210145 issued to C. H. Elle Construction Company of Alameda, Bannock Co., Idaho by the St. Paul-Mercury Indemnity Insurance Company, St. Paul, Minn.

Not valid until countersigned by an officer or an agent or an attorney-in-fact of the Company.

Countersigned at San Francisco, Calif. this 27th day of June, 1952.

P. F. McKown,
Resident Vice President,

By .....
A. B. Jackson,
President.

Rider No. I

Applicable to the Comprehensive General and Automobile Liability Insuring Agreement.

It is agreed that the Limits of Liability under Section C Property Damage Liability Other than Automobile is hereby amended as follows: $50,000.00 Each Occurrence, $300,000.00 Aggregate Operations, $300,000.00 Aggregate Protective, $300,000.00 Aggregate Contractual, $300,000.00 Aggregate Products and completed Operations.

This Rider shall take effect on the 29th day of February, 1952.

Forming part of Policy No. 6210145 issued to C. H. Elle Construction Company of Alameda, Bannock Co., Idaho by the St. Paul-Mercury Indemnity Insurance Company, St. Paul, Minn.

Not valid until countersigned by an officer or an agent or an attorney-in-fact of the Company.

Countersigned at San Francisco, Calif. this 12th day of March, 1952.

A. B. Jackson,
President.

Sections A and C (Aggregate Products and Completed Operations):

The limits of bodily injury liability and property damage liability stated as "aggregate products and completed operations" are respectively the total limits of the Company's liability for all damages arising out of the handling or use of or the existence of any condition in goods or products manufactured, sold, handled or distributed by the Insured or caused by operations, other than pick-up and delivery and the existence of tools, uninstalled equipment and abandoned or unused materials, when the occurrence takes place away from premises owned, rented or controlled by the Insured and after the Insured has relinquished possession of such goods or products to others or after the operations have been completed or abandoned at the place of occurrence. All such damages arising out of one prepared or acquired lot of goods or prod-

ucts shall be considered as arising out of one occurrence.

Sections B and C:

All damage arising out of a continuous or repeated exposure to substantially the same condition shall be considered as arising out of one occurrence.

Section C:

The limit of Property Damage liability stated as "aggregate operations" is the total limit of the Company's liability for all damages arising out of damage to or destruction of property, including the loss of use thereof, caused by or arising out of operations of the Insured away from premises owned, leased or rented by the Insured.

The limit of Property Damage liability stated as "aggregate protective" is the total limit of the Company's liability for all damages arising out of damage to or destruction of property including the loss of use thereof, caused by operations performed for the Insured by independent contractors or omissions of supervisory acts of the Insured in connection therewith, except maintenance or ordinary alterations and repairs on premises owned or rented by the Insured.

The limit of Property Damage liability stated as "aggregate contractual" is the total limit of the Company's liability for all damages arising out of damage to or destruction of property, including the loss of use thereof, with respect to each contract.

The limits stated apply separately to each project with respect to operations being performed away

from premises owned or rented by the named Insured.

Elevators and Premises:

The terms of this Insuring Agreement shall apply separately to each elevator and each location insured hereunder.

3—Cross Liability:

With respect to this Insuring Agreement the inclusion of more than one Insured under this Policy shall not in any way affect the rights of any such Insured either as respects any claim, demand, suit or judgment made, through any or in favor of any other Insured, or by or in favor of any employee of such other Insured. This Insuring Agreement shall protect each Insured in the same manner as though a separate policy had been issued to each; but nothing contained in this paragraph shall operate to increase the Company's liability as set forth elsewhere in this Insuring Agreement beyond the amount or amounts for which the Company would have been liable if only one person or interest had been named as Insured.

4—Territory:

This Insuring Agreement applies to occurrences taking place within the United States of America. With respect to automobiles, this Insuring Agreement applies to occurrences which occur while the automobiles are within the United States of America, its territories or possessions, Canada, or while being transported between ports thereof in that part of Mexico within seventy-five (75) miles of the United States boundary line.

5 — Financial Responsibility Laws — Sections A and B:

Such insurance as is afforded by this Insuring Agreement for bodily injury liability or property damage liability shall comply with the provisions of the motor vehicle financial responsibility law of any State or province which shall be applicable with respect to any such liability arising out of the ownership, maintenance or use during the Policy Period of any automobile insured hereunder, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this Policy.

Inapplicable Policy Conditions

Paragraphs 3, 14 and 15 of the General Conditions of the Policy do not apply with respect to this Insuring Agreement.

Not valid until countersigned by an officer or an agent or an attorney-in-fact of the Company.

P. F. McKown,
Resident Vice President,

By .....
M. D. Price,
President.

Comprehensive General and Automobile Liability (Broad Form) Insuring Agreement

This Insuring Agreement shall take effect on the 15th day of June, 1951.

Attached to and forming part of Contract of Insurance No. 6210145 issued to C. H. Elle Construc-

tion Company of Alameda, Bannock Co., Idaho by the Saint Paul-Mercury Indemnity Company, St. Paul, Minnesota.

Countersigned at San Francisco, California this 5th day of July, 1951.

No insurance is provided under any of the following Sections unless so indicated by entries showing the Company's limit of liability.

The limit of the Company's liability under each such Section shall be as stated therein, subject to all of the terms of this Policy and Insuring Agreement having reference thereto.

Section A. Bodily Injury Liability (Including Automobile): Limits of Liability: $50,000.00 each person, $100,000.00 each occurrence, $100,000.00 aggregate products and completed operations.

Section B. Automobile Property Damage Liability: Limits of Liability: $100,000.00 each occurrence.

Section C. Property Damage Liability Other Than Automobile: Limits of Liability: $50,000.00 each occurrence, $100,000.00 aggregate operations, $100,000.00 aggregate protective, $100,000.00 aggregate contractual, $100,000.00 aggregate products and completed operations.

I. Section A—Bodily Injury Liability (Including Automobile):

The Company agrees to pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law or contract for damages, including damages for care and loss of services, because

of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person or persons.

II. Section B — Automobile Property Damage Liability:

The Company agrees to pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law or contract for damages because of damage to or destruction of property, including the loss of use thereof, arising out of the ownership, maintenance or use of any automobile.

III. Section C — Property Damage Liability Other Than Automobile:

The Company agrees to pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law or contract for damages because of damage to or destruction of property, including the loss of use thereof.

Exclusions

This Insuring Agreement Does Not Apply:

(a) except with respect to operations performed by independent contractors, to aircraft:

(b) under Section A (except with respect to liability assumed under contract) to:

1—Bodily Injury to or sickness, disease or death of any employee of the named Insured while engaged in the employment of the Insured, other than domestic employees with respect to the operation, maintenance or repair of an automobile, or

2—Any obligation for which the Insured may be

held liable under any Workmen's Compensation Law;

(c) under Section B, to damage to or destruction of property owned by rented to in charge of or being transported by or for the Insured;

(d) under Section C, except with respect to operations performed by independent contractors, to the ownership, maintenance or use, including loading or unloading, of automobiles while away from the premises (or the ways immediately adjoining) owned, leased, rented or controlled by the Insured;

(e) under Section C, to damage to or destruction of

1—any goods or products manufactured, sold, handled or distributed by the Insured, or work completed by or for the Insured out of which the damage or destruction arises;

2—(a) any property owned, leased, used, or rented by the Insured or held by the Insured for sale, any property being transported by or on behalf of the Insured, or, except with respect to liability assumed under sidetrack agreements or the use of elevators or escalators, any personal property in his possession;

(b) That specific part of any property upon which operations are being performed by or on behalf of the Insured at the time of the damage or destruction thereof;

(f) to the restoration, repair, or replacement of buildings, structures, property or other work made necessary by faulty workmanship thereon.

Special Conditions

Such insurance as is provided by this Insuring Agreement applies only in connection with the business, occupational or commercial pursuits of the Insured except as respects the liability arising out of the ownership, operation or maintenance of automobiles insured hereunder.

1—Definitions

(a) Insured

The unqualified word "Insured" wherever used also includes any partner, executive officer, director or stockholder thereof while acting within the scope of his duties as such.

The coverage afforded under this Insuring Agreement with respect to automobiles owned by, registered in the name of, or hired by the Insured, is extended to any other person, firm or corporation while using or legally responsible for the use thereof, provided such use is with the permission of an Insured, who is the legal or registered owner of or hires the automobile, and if such Insured is an individual he may give such permission through an adult member of his household other than a domestic servant or chauffeur.

This extension of coverage does not apply:

(1) to any person, firm or corporation or to any agent or employee thereof operating an automobile repair shop, public garage, sales agency, service station or public parking place, with respect to any accident arising out of the operation thereof;

(2) with respect to an automobile while used with any trailer not covered by like insurance in

the Company; or with respect to a trailer, while used with any automobile not covered by like insurance in the Company;

(3) with respect to any hired automobile, to the owner thereof or an employee of such owner;

(4) with respect to any non-owned automobile, to any executive officer if such automobile is owned in full or in part by him or a member of his household.

(b) Automobile

The word "automobile" shall mean a land motor vehicle trailer or semi-trailer, provided the following described equipment shall not be deemed an automobile except while towed by or carried on a motor vehicle not so described; any crawler-type tractor, farm implement, farm tractor or trailer not subject to motor vehicle registration, ditch or trench digger, power crane or shovel, grader, scraper, roller, well drilling machinery, asphalt spreader, concrete mixer and mixing and finishing equipment for highway work, other than a concrete mixer of the mix-in-transit type. The word "trailer" shall include semi-trailer.

"Owned Automobile" shall mean an automobile owned in full or in part by an Insured named in the Policy.

"Hired Automobile" shall mean an automobile used under contract in behalf of a named Insured provided such automobile is not owned in full or in part by or registered in the name of (a) a named Insured or (b) an executive officer thereof or (c) an employee or agent of a named Insured

who is granted an operating allowance of any sort for the use of such automobile.

"Non-owned Automobile" shall mean any other automobile.

2—Limits of Liability

Section A

The limit of bodily injury liability applicable to "each person" is the limit of the Company's liability for any damages, including damages for care and loss of services arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by one person in any one occurence; the limit of such liability applicable to "each occurrence" is, subject to the above provisions respecting each person, the total limit of the Company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by two or more persons in any one occurrence.

Sections A and B

The terms of this Policy shall apply separately to each automobile insured hereunder but a motor vehicle and a trailer or trailers attached thereto shall be considered to be one automobile as respects limits of liability.

Insuring Agreement

This Insuring Agreement shall take effect on the 15th day of June, 1951.

Attached to and forming part of

Contract of Insurance No. 6210145 issued to C. H.

Elle Construction Company of Alameda, Bannock Co., Idaho, by the Saint Paul-Mercury Indemnity Company, St. Paul, Minnesota. Countersigned at San Francisco, California, this 5th day of July, 1951.

The Company Agrees to pay the reasonable expense for necessary medical, surgical, ambulance, hospital and professional nursing services and, in the event of death resulting from such injury, the reasonable funeral expense, all incurred within one year from the date of the accident to or for each person who sustains bodily injury caused by accident, while in or upon, entering or alighting from:

I—Any private passenger automobile owned or hired by the named Insured if the injury arises out of the use thereof by or with the permission of the named Insured, or

II—Any other automobile while being used by or in behalf of the named Insured or spouse, if the injury arises out of the use thereof and results from:

(A) the operation of said automobile by the named Insured or spouse or any private chauffeur or domestic servant of either, or

(B) the occupancy of said automobile by the named Insured or spouse.

Exclusions

This Insuring Agreement Does Not Apply:

(a) (1) To bodily injury to or sickness, disease or death of any employee of the named Insured while engaged in the employment of the Insured,

other than domestic employees with respect to the operation, maintenance or repair of an automobile, or

(2) To any obligation for which the Insured may be held liable under any Workmen's Compensation Law;

(b) under Division II to:

(1) any automobile hired as part of a frequent use of hired automobiles by or furnished for regular use to, the named Insured or a member of his household other than a private chauffeur or domestic servant;

(2) any automobile while used in the business or occupation of the named Insured or spouse, if operated by a person other than the named Insured or spouse or such chauffeur or servant unless the named Insured or spouse is present in such automobile;

(3) any accident arising out of the operation of an automobile repair shop, public garage, sales agency, service station or public parking place.

Special Conditions

Definitions—"Automobile"

The word "automobile" shall mean a land motor vehicle, trailer or semi-trailer, provided the following described equipment shall not be deemed an automobile except while towed by or carried on a motor vehicle not so described; any crawler-type tractor, farm implement, farm tractor or trailer not subject to motor vehicle registration, ditch or trench digger, power crane or shovel, grader,

scraper, roller, well drilling machinery, asphalt spreader, concrete mixer and mixing and finishing equipment for highway work, other than a concrete mixer of the mix-in-transit type. The word "trailer" shall include semi-trailer.

"Owned Automobile" shall mean an automobile owned in full or in part by the Insured named in the Policy.

"Hired Automobile" shall mean an automobile used under contract in behalf of the named Insured provided such automobile is not owned in full or in part by or registered in the name of (a) the named Insured, or (b) an executive officer thereof, or (c) an employee or Agent of the named Insured who is granted an operating allowance of any sort for the use of such automobile.

"Non-owned Automobile" shall mean any other automobile.

Limit of Liability—$500.00 shall be available for each person who sustains Bodily Injury or death covered by this Insuring Agreement.

Medical and Other Reports; Examination—The injured person or someone on his behalf shall, as soon as practicable after each request from the Company, furnish reasonably obtainable information pertaining to the accident and injury, and execute authorization to enable the Company to obtain medical reports and examine records. The injured person shall submit to physical examination by physicians selected by the Company when and as often as the Company may reasonably require.

Proof, and Payment of Claim—As soon as prac-

ticable after completion of the services or after the rendering of services which in cost equal or exceed the limit of liability for this insurance or after the expiration of one year from date of the accident, whichever is first, the injured person or someone on his behalf shall give to the Company written proof of claim under oath, stating the name and address of each person and organization which has rendered services, the nature and extent and the dates of rendition of such services, the itemized charges therefor and the amounts paid thereon. Upon the Company's request, the injured person or someone on his behalf shall cause to be given to the Company by each such person and organization written proof of claim under oath, stating the nature and extent and dates of rendition of such services, the itemized charges therefor and the payments received thereon.

The Company shall have the right to make payment at any time to the injured person or to any such other person or organization on account of the services rendered, and a payment so made shall reduce to the extent thereof the amount payable hereunder to or for such injured person on account of such injury. Payment hereunder shall not constitute admission of liability of the Insured or of the Company.

Territory—This Insuring Agreement applies to occurrences or accidents taking place while the automobiles are within the United States of America, its territories or possessions, Canada, or while being transported between ports thereof, or in

that part of Mexico within seventy-five (75) miles of the United States boundary line.

Inapplicable Policy Conditions

Paragraphs 3, 5b, 7, 8, 14 and 15 of the General Conditions of the Policy do not apply with respect to this Insuring Agreement.

Not valid until countersigned by an officer or an agent or an attorney-in-fact of the Company.

M. D. PRICE,
President,
P. F. McKown,
Resident Vice President,
By:

[Endorsed]: Filed November 9, 1956.

[Title of District Court and Cause.]

RESPONSE TO DEFENDANT'S REQUEST FOR ADMISSIONS

The plaintiffs make the following admissions and denials to the Request for Admissions served on the plaintiffs on the 8th day of November, 1956 by the defendant, Western Casualty and Surety Company, a corporation:

Request I.

Plaintiffs admit the multiple coverage policy No. 6210145 and the riders and insurance agreement as attached to the Request for Admissions are genuine, but plaintiffs deny that said policy "insured the

C. H. Elle Construction Co. against any loss by reason of bodily injury," but insures only those losses covered by the wording of said policy.

Request II.

(a) Plaintiffs admit that the policy referred to insured C. H. Elle Construction Company, but denies that said insurance company agreed to pay on behalf of the said insured, C. H. Elle Construction Company, all sums which insured became obligated to pay by reason of the liability imposed upon the insured by law, and states that the coverage of said policy is contained in the wording of said policy, which also includes as Paragraph 11 under "General Conditions", the following:

"Other Insurance—No Insuring Agreement hereof shall apply to any loss if the Insured is, or would be but for the existence of such Insuring Agreement, insured against such loss under any other policy or policies, bond or bonds, except as respects any excess beyond the amount which would have been payable under any other such policy or policies, bond or bonds, had such Insuring Agreement not been effective."

(b) Plaintiffs admit that on the 22nd day of August, 1954, the above policy of insurance was in effect and admit that the payment of the judgment in the case of Mary Lou Campbell, et al, v. C. H. Elle Construction Co., et al, was made by the plaintiff herein, St. Paul-Mercury Indemnity Co., but states that said payment was made after refusal of the defendant herein to assume coverage according to its insurance contract.

(c) Admitted.

(d) Plaintiffs admit that in the action entitled Mary Lou Campbell, et al. v. C. H. Elle Construction Co., et al, judgment was rendered in favor of the plaintiffs and against C. H. Elle Construction Co. and against M. Burke Horsley, agent and servant of C. H. Elle Construction Co.; and that judgment was against the plaintiffs and in favor of the defendant William S. Gagon; but plaintiffs deny that the Complaint in the above described action alleged that the 1954 Chevrolet Truck was being operated by M. Burke Horsley with the consent and permission of William S. Gagon.

(e) Denied.

(f) Plaintiffs admit that the judgment so rendered against the defendants C. H. Elle Construction Co. and Mr. Burke Horsley was paid by St. Paul-Mercury Indemnity Co., but plaintiffs deny that said payment was made without consultation of or notice to the said defendant herein.

Request III.

Plaintiffs admit that the policy of insurance issued by the St. Paul-Mercury Indemnity Co. contained, among other provisions, the portion quoted in Request III.

Request IV.

Denied.

Request V.

Admitted.

Request VI.

Plaintiffs admit that the policy of insurance

issued to William S. Gagon by the defendant herein contained, among other provisions, the portions quoted in Request VI.

Request VII.

Plaintiffs admit that the judgment in the District Court of the 5th Judicial District of the State of Idaho in and for the County of Bannock was in favor of the plaintiffs and against the defendants C. H. Elle Construction Co. and M. Burke Horsley and was in favor of the defendant, William S. Gagon; but plaintiffs deny the balance of Request VII.

Request VIII.

Denied.

Request IX.

Plaintiffs admit that the firm of Merrill & Merrill, attorneys at law, defended C. H. Elle Construction Co. at the request of the St. Paul-Mercury Indemnity Co. and plaintiffs admit that Merrill & Merrill, attorneys at law, appeared as co-counsel on behalf of M. Burke Horsley at the request of the said St. Paul-Mercury Indemnity Co., the other counsel representing M. Burke Horsley being O. R. Baum, attorney at law, Pocatello, Idaho.

Request X.

Plaintiffs deny that the plaintiff St. Paul-Mercury Indemnity Co., through its counsel, directed the action of said action so filed in the 5th Judicial District of the State of Idaho in and for the

County of Bannock, stating that the defense of said action was jointly conducted by Merrill & Merrill who appeared as counsel for C. H. Elle Construction Co. and as co-counsel for M. Burke Horsley and Max Larsen, said individuals also appearing by and through their attorney, O. R. Baum, attorney at law, Pocatello, Idaho, and O. R. Baum, attorney at law, Pocatello, Idaho, who appeared for and on behalf of William S. Gagon, defendant in said action. Plaintiffs admit that the same counsel appeared for C. H. Elle Construction Co. in the action filed in the District Court of the State of Idaho as appears in the present action for the plaintiffs herein.

Respectfully submitted,

MERRILL & MERRILL,

/s/ By WESLEY F. MERRILL,

Attorneys for Plaintiffs.

Duly Verified.

Acknowledgment of Service Attached.

[Endorsed]: Filed November 19, 1956.

[Title of District Court and Cause.]

PLAINTIFFS' ADDITIONAL REQUEST FOR ADMISSIONS

Whereas defendant in its response to Request for admissions served on the 8th day of November, 1956, in answer to Request I(b) stated that the copy referred to therein was not legible, plaintiffs

hereby request the defendant to make the following admissions for the purpose of the within action only, within ten days after service of this Request.

I.

That each of the following documents exhibited with this Request is genuine.

(a) That document designated as "SR 21 Notice of Policy Under Section 5 of Idaho Motor Vehicle Safety Responsibility Act" dated Oct. 5, 1954, signed "The Western Casualty & Surety Co., Fort Scott, Kansas by American Agencies, Inc., General Agents by A. W. Kay, Secretary," a copy of which SR 21 is attached hereto.

Dated this 16th day of November, 1956.

MERRILL & MERRILL,
/s/ By W. F. MERRILL,
Attorneys for Plaintiffs.

[Note: Document designated as "SR 21 Notice of Policy Under Section 5 of Idaho Motor Vehicle Safety Responsibility Act" is the same as set out at pages 58-59]

Acknowledgment of Service Attached.

[Endorsed]: Filed November 19, 1956.

[Title of District Court and Cause.]

RESPONSE TO PLAINTIFFS' ADDITIONAL REQUEST FOR ADMISSIONS

The defendant makes the following responses and denials to request for additional admissions.

Request I.

States that the Company itself has no knowledge that document designated as SR-21, Notice of Policy Under Sec. 8 of the Idaho Motor Vehicle Safety Responsibility Act, dated October 5, 1954, was ever signed; that the only information that the Company had as to the accident referred to in such exhibit is that it was given by the insured William S. Gagon to the L M Insurance Agency at Soda Springs, Idaho, which information undoubtedly was forwarded. Your affiant states that if the SR-21 referred to was signed in the manner that is shown on the Request that the same was signed without having adequate, proper and correct information; that inquiry is being made this day from the Company at Fort Scott, Kansas, and likewise from the American Agency for an explanation of such exhibit; that additional information is being sought for the purpose of answering such request; that this answer is being signed by counsel for the defendant, although letters are out asking for correct information as to why the said SR 21 was signed, if it ever was signed.

That a special agent for the Company called the undersigned, Attorney for defendant, by phone, and

certain information was obtained, and the undersigned understands that a statement was also made by William S. Gagon to the special agent. Whether that was by phone or otherwise, the undersigned is unable to state.

/s/ O. R. BAUM,
/s/ BEN PETERSON,
Attorneys for Defendant.

Duly Verified.

Acknowledgment of Service Attached.

[Endorsed]: Filed November 26, 1956.

[Title of District Court and Cause.]

DEPOSITIONS OF JESSIE GAGON and WILLIAM GAGON, Taken by Plaintiffs

This Cause came regularly on for hearing, pursuant to Notice of Taking Deposition filed herein, in the Bannock County Courthouse, Pocatello, Idaho, on Tuesday, November 20th, 1956, at the hour of eleven thirty a.m., before Ray D. Bistline, a Notary Public for the State of Idaho, residing at Pocatello therein, for the taking of the depositions of Jessie Gagon and William S. Gagon, on behalf of the Plaintiffs; the plaintiffs not appearing in person but by their counsel, W. F. Merrill, Esq., of the firm of Merrill & Merrill, attorneys at law, Pocatello, Idaho; and the defendant not

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* Page numbers appearing at top of page of Original Deposition.

appearing in person but by Hon. O. R. Baum, and Ben Peterson, Esq., both of Pocatello, Idaho; [2]

Whereupon, the following proceedings were had, to-wit:

Mr. Merrill: Let the record show, Mr. Bistline, that this matter came on for hearing pursuant to Notice of Taking Depositions, and subpoenas served on Mrs. Jessie Gagon and Mr. William S. Gagon; that said matter was continued by agreement of counsel from Saturday, November 17th, 1956, at eleven o'clock a.m., until this time, Tuesday, November 20th, 1956, at eleven thirty o'clock a.m.

Judge Baum: And that the agreement continuing the matter until this time was to accommodate counsel for the defendant. The defendant, however, does not waive his right to waive any questions as to the depositions and to their right to take the depositions, it being agreed merely that the depositions could be taken at this hour in lieu of the hour set in the subpoenas.

Mr. Merrill: That was for the accommodation of counsel for the defendant?

Judge Baum: That is right. But all other objections are reserved.

Mr. Merrill: And will you waive the signing of the depositions by the witnesses?

Judge Baum: Yes; that will be satisfactory.

Mr. Merrill: You may be sworn, Mrs. Gagon, please. [3]

Whereupon,

MRS. JESSIE GAGON

called as a witness by the plaintiffs, having been by me first duly sworn to testify to the truth, the whole truth, and nothing but the truth, deposed and testified as follows:

Direct Examination

Q. (By Mr. Merrill): Would you state your full name, please? A. Jessie Gagon.

Q. And where do you live?

A. Soda Springs, Idaho.

Q. And to whom are you married?

A. William S. Gagon.

Q. May I ask approximately how long you have been married to Mr. Gagon?

A. Since 1929.

Q. And you were married to Mr. Gagon then on August 22nd, 1954? A. Yes, sir.

Q. Is there a Gagon Lumber Yard in Soda Springs? A. Yes, sir.

Q. And who owns that?

A. William S. Gagon. [4]

Q. Is that your husband? A. Yes, sir.

Q. Do you do any work or help with the operation of that lumber yard?

A. I keep the books.

Q. And in August of 1954 who was keeping the books? A. I was keeping the books.

Q. You were doing the bookkeeping for the entire lumber business? A. Yes, sir.

Q. As bookkeeper do you have occasion to go

(Deposition of Mrs. Jessie Gagon.)

to the lumber yard offices and remain there at any time?

A. Oh, about one thirty in the afternoon, or perhaps two thirty, and I stay until I have finished up the books for that day.

Q. Now, Mrs. Gagon, you are aware of an accident that occurred on August 22nd, 1954, involving a truck driven by Bert Horsley and a car driven by Arnold Campbell? A. Yes.

Q. Now directing your attention then to that day, August 22nd of 1954,——

Judge Baum: Mr. Merrill, pardon me. Could we have it understood that each side reserves all objections to [5] any questions?

Mr. Merrill: Yes, Judge Baum.

Judge Baum: Now, if you would read him the question, Mr. Reporter?

(Pending question read by Reporter as above recorded.)

Q. (Mr. Merrill, continuing): Directing your attention to the day of August 22nd, 1954, was there on that day a 1954 Chevrolet truck owned by the Gagon Lumber Yard?

A. Yes; we had a Chevrolet truck.

Q. On that day did anyone ask you for the use of that truck? A. Yes.

Q. And who asked you? A. Bert Horsley.

Q. Where does Bert Horsley live?

A. In Soda Springs.

Q. Now at that time, on August 22nd, 1954, did you know for whom Mr. Horsley was working?

(Deposition of Mrs. Jessie Gagon.)

A. No. He worked for himself.

Q. Did you know that he was working for the C. H. Ellie Construction Company at that time?

A. I understood he had a job with Mr. Elle. [6]

Q. At that time? A. Yes.

Q. Now, where were you when you were asked about the truck? A. I was home.

Q. And how were you contacted?

A. By phone.

Q. And you were asked if the truck could be borrowed; is that correct?

A. He asked if he could borrow the truck, and if he could have it if I would get the keys for him.

Q. And then what did you do?

A. Well, after, I went to the lumber yard and got the keys for him.

Q. Do you remember what day of the week it was? A. Yes, I remember. It was Sunday.

Q. Was the lumber yard closed? A. Yes.

Q. Did you have keys to the lumber yard?

A. Yes, sir.

Q. And those were the keys that you used to get into the lumber yard?

A. Yes; I opened the door. [7]

Q. And where was the key to the truck? Do you recall?

A. It was on the cash register, where it is usually kept.

Q. That is its usual place? A. Yes, sir.

Q. And did Mr. Horsley meet you at the lum-

(Deposition of Mrs. Jessie Gagon.)

ber yard? A. Yes; he met me there.

Q. And was there anyone with him?

A. No.

Q. And then what did you do when Mr. Horsley got there?

A. I just gave him the keys and locked the door and went away, and he went away.

Q. Who drove the truck out of the lumber yard?

A. Mr. Horsley.

Q. Could you tell us whether or not there was any discussion as to payment for the use of the truck at that time? A. No.

Q. Was there any discussion as to payment for the gas and oil used? A. No.

Q. Would you state whether or not you were aware that Mr. Horsley had prior to this time borrowed equipment from the Gagon Lumber Yard?

A. No.

Q. So far as you are aware, he had not?

A. No.

Q. Was this 1954 Chevrolet truck used in the Gagon Lumber Yard business? A. Yes.

Q. Do you know whether or not that truck was involved in an accident that day? A. Yes.

Q. Would you tell us, Mrs. Gagon, whether or not arrangements were ever made after that date for payment for the use of the truck?

A. Yes.

Q. And who made those arrangements, if you know? A. Mr. Gagon.

Q. And with whom?

(Deposition of Mrs. Jessie Gagon.)

A. I don't know that. There was a slip made for the charge, and it was in the regular drawer with the other slips.

Q. Did you make out the slip? A. No.

Q. Who did? A. Mr. Gagon.

Q. In line with your bookkeeeping of the firm, do you [9] recall whether or not a check was received on October 6th from C. H. Elle Construction Company in the amount of $15.00?

A. No; there was no check in the amount of $15.00. There was a check that came for the entire bill.

Judge Baum: That is our original, Mr. Merrill, and we,——

Mr. Merrill: May we then withdraw it and have a copy substituted?

Judge Baum: If you will do that; yes.

Mr. Merrill: May we have this deemed marked then as Plaintiffs' Exhibit "A" for identification?

(Whereupon, Plaintiffs' Exhibit "A", the same being original ledger sheet was deemed marked by the Reporter.)

Q. (By Mr. Merrill, continuing): You mentioned that a sum was paid along with the other bill,—what other bill do you mean?

A. Well, the other bills that are charged on the ledger sheet that you have there. There were other bills that were charged to this same account.

Q. Were any of these separate items paid for separately?

(Deposition of Mrs. Jessie Gagon.)

A. No. The bill was paid in one amount by the Elle Construction Company. [10]

Q. I hand you what has been deemed marked as Plaintiffs' Exhibit "A" for identification. Would you state what that is?

A. It is a ledger sheet that was made up in the office of Gagon Lumber Company.

Q. And is that made up under your supervision? A. Yes. I made it.

Q. You made it personally? A. Yes, sir.

Q. Directing your attention to August 6th, do you find an item there of $15.00?

A. August 6th?

Q. October 6th. A. Yes.

Q. And are there any other items on that date?

A. No.

Q. Do you have any personal recollection as to what that $15.00 item would be?

A. I do, because I looked it up yesterday.

Q. You looked it up from where?

A. From our records.

Q. Those are the records you keep?

A. Yes, sir. [11]

Q. And what was that $15.00 item?

A. It was a charge for the rental of the truck.

Q. "Rental of the truck?" You mean this 1954 Chevrolet truck we are talking about?

A. Yes.

Q. Do you know where it came from, that $15.00 payment?

A. Where the $15.00 payment came from?

(Deposition of Mrs. Jessie Gagon.)

Q. Yes.

A. It came from the Elle Construction Company.

Q. From the Elle Construction Company?

A. Yes, sir.

Mr. Merrill: We offer in evidence what has been deemed marked as Plaintiffs' Exhibit "A" for identification.

Judge Baum: We reserve the right to object at the appropriate time. You will substitute a copy, will you?

Mr. Merrill: Yes, I will have one made.

Q. (By Mr. Merrill, continuing): The $15.00, Mrs. Gagon, was that put into the account of the Gagon Lumber Company? A. Yes, sir.

Q. And used in the business? A. Yes.

Q. As any other payment would have been?

A. That is right. [12]

Mr. Merrill: I think that is all, Mrs. Gagon. Thank you.

Judge Baum: Just a minute, please.

Cross Examination

Q. (By Judge Baum): What is the fact as to whether or not your husband had ever authorized you to loan any equipment?

Mr. Merrill: We object to that on the ground it calls for a conclusion of the witness.

Q. (Judge Baum, continuing): Just state the fact, please. A. No.

(Deposition of Mrs. Jessie Gagon.)

Q. Had you at any time ever loaned any of the equipment of your husband to Bert Horsley?

A. No.

Q. Or to anybody else? A. No.

Q. Had the equipment, so far as you know, ever been loaned to Bert Horsley before? A. No.

Q. This particular truck, what is the fact as to whether or not your husband had ever given you authority to loan it to Mr. Horsley? [13]

Mr. Merrill: We object on the same ground. It calls for a conclusion of the witness.

Q. (Judge Baum, continuing): Answer, please.

A. No.

Q. Describe the nature of your employment, please.

A. I keep the books for the Gagon Lumber Company, and I am a house wife.

Q. And you have no part in the operation of the business other than keeping the books?

A. No.

Q. Do you ever buy for the company?

A. No.

Q. Do you bid on contracts? A. No.

Q. Do you have anything to say about the operation of the company? A. No.

Q. Who does? A. William S. Gagon.

Q. And that prevailed in August of 1954?

A. Yes.

Q. Was your husband home on August 22nd, 1954? A. No. [14]

Q. Where was he, if you know?

(Deposition of Mrs. Jessie Gagon.)

A. He was fishing on Snake River.

Q. He was out of the state then, was he?

A. Yes.

Q. What time was it, — were you home when your husband got home that evening? A. No.

Q. When you came home what time was it?

A. Oh, perhaps six to six thirty.

Q. And did you advise your husband about the truck?

A. Yes; he had come home and he was asleep and I woke him and told him.

Q. Was that before or after the accident?

A. It was after the accident. I would say six thirty to seven o'clock, — something like that. I couldn't be sure as to the exact time.

Q. You didn't report that you had loaned the truck prior to the accident? A. No.

Q. This statement that opposing counsel asked you about, did you have a bill that had been left in the drawer, or where your bills were kept, that caused you to extend that on the books? [15]

A. Yes, sir.

Judge Baum: May we have that, Mr. Merrill?

Mr. Merrill: Yes.

Judge Baum: No; the other. And will you mark this for identification as Defendant's Exhibit No. 1, Mr. Reporter?

(Defendant's Exhibit No. 1, for identification, R. D. B., the same being charge slip, was marked by the Reporter.)

Q. (Judge Baum, continuing): The ledger sheet

(Deposition of Mrs. Jessie Gagon.)

that was shown to you by Mr. Merrill contains an item of October 6th, 1954. Was that about the time that that bill was extended on your books?

A. Yes, sir.

Q. And what was that charge on this slip based upon? Where did you get the information?

A. Well, from our original sales slip.

Q. Did you have any record prior to the charge on this sales slip of any charge for the use of that truck? A. No.

Q. I hand you a sales slip; what date does it bear? A. October 6th, 1954.

Q. Is that the first information you had as to a rental [16] for that truck? A. Yes.

Q. Had there been any item for rental extended on your books prior to that date? A. No.

Q. And in whose handwriting is that exhibit?

A. William S. Gagon's.

Q. And where did you find that sales slip?

A. In the drawer with the other sales slips.

Q. Was that about on the date that bears?

A. Yes, it would have been about that date. Sometimes I don't post every day, but it would have been the following day.

Judge Baum: That is all.

Redirect Examination

Q. (By Mr. Merrill): Mrs. Gagon, the Gagon Lumber Company is an individual ownership, isn't it? A. Yes, sir.

Q. Owned by you and your husband?

(Deposition of Mrs. Jessie Gagon.)

A. No; owned by my husband.

Q. Owned by your husband?

A. Yes, sir. [17]

Q. And you are married to him?

A. Yes, sir.

Q. And have been since about 1922, did you say?

A. No; since 1929.

Q. How long had Mr. Gagon been out of town on this fishing trip?

A. He went on Saturday afternoon.

Q. That would be August 21st? A. Yes.

Q. The day before the accident?

A. Yes, sir.

Q. And I believe you stated there was no conversation between you and Mr.,—no arrangement between you and Mr. Horsley as to rental at the time he took the truck?

A. Yes. There was no arrangement for rental. There were no arrangements for rental at that time.

Q. No arrangement to pay for the gas, or anything? A. No.

Mr. Merrill: I think that is all.

Judge Baum: That is all, Mrs. Gagon.

Mr. Merrill: You may step down, Mrs. Gagon.

(Witness excused.)

(Waiving of deposition being signed. See page 3.) [18]

DEPOSITION OF WILLIAM S. GAGON

Mr. Merrill: We will call Mr. William S. Gagon.

Whereupon,

WILLIAM S. GAGON

called to testify by the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Merrill): Will you state your name, please? A. William S. Gagon.

Q. And where do you live?

A. Soda Springs, Idaho.

Q. And you are the husband of Mrs. Jessie Gagon who just testified here? A. I am.

Q. Are you the owner of the Gagon Lumber Yard at Soda Springs, Idaho? A. I am.

Q. Now, directing your attention to August 22nd of 1954, could you state whether or not there was a 1954 Chevrolet truck owned by you at that time? A. There was, sir.

Q. There was? A. Yes, sir. [19]

Q. And that was used in the lumber business?

A. Yes, sir.

Q. Do you happen to know where the truck actually was on August 22nd, 1954? A. No.

Q. Where was it the last time you saw it?

A. In the lumber yard, in the back of the yard.

Q. And when was that?

A. Well, I think it was the morning of the 21st, before I went fishing.

Q. Was that prior to the time the business was closed for Saturday?

(Deposition of William S. Gagon.)

A. The business doesn't close on Saturday.

Q. It closes in the evening?

A. At six o'clock; yes.

Q. And did you see it around six o'clock that night? A. I wasn't there.

Q. When did you leave on the 21st of August?

A. Oh, it was in the morning.

Q. This 1954 Chevrolet truck was involved in an accident on August 22nd, 1954, was it not?

A. Yes.

Q. Did you go to the scene of the accident with anyone [20] after it happened?

A. With anyone? No, I went by myself.

Q. The next day after the accident, on August 23rd, did you go with Mr. Bert Horsley to the scene of the accident?

A. I don't think I did. I don't remember.

Q. Will you state whether or not you had ever reported this Chevrolet truck as a stolen vehicle on August 22nd, 1954?

Judge Baum: To which we object as incompetent, irrelevant and immaterial, and not within the issues.

Q. (Mr. Merrill, continuing): You may answer now. A. I did not.

Q. Mr. Gagon, would you state what company, insurance company, had the liability and property damage insurance to cover this truck?

A. I think the Western.

Q. Would that be the Western Casualty and Surety Company? A. Yes, sir.

(Deposition of William S. Gagon.)

Q. Would you state whether or not you reported this accident to them?

A. I reported it to Mr. Mathews.

Q. And what connection does Mr. Mathews have with the Western Casualty and Surety Company?

A. He was the agent, I think, for them.

Q. Would you state whether or not you advised Mr. Mathews as to the facts of the accident?

A. I just told him that the truck was in a wreck.

Q. Did you advise him as to the facts, what you knew about it.

A. Yes; the condition of the truck.

Q. Would you state, prior to August 22nd, 1954, whether or not you had ever loaned equipment to Mr. Bert Horsley as an employee of the C. H. Elle Construction Company?

A. I had never loaned any; no.

Q. Isn't it a fact that he borrowed an item of your equipment to carry some steel forms just shortly before that? A. No.

Q. You have no recollection of that?

A. No.

Q. What arrangements do you have with the C. H. Elle Construction Company for borrowing or loaning vehicles between yourselves?

A. I have none.

Q. Do you have a general understanding with the president of that company? A. Yes. [22]

Q. And is that,—what are the terms of that general understanding?

(Deposition of William S. Gagon.)

A. There is nothing. There has been no discussion on loaning equipment at all.

Q. You have loaned it to him before?

A. No.

Q. You have never loaned it before August 22nd, 1954? A. No.

Q. Had he ever borrowed from you prior to that time? A. No.

Q. Mr. Gagon, did you send the C. H. Elle Construction Company a bill for the use of this vehicle? A. I did.

Q. And in what amount? A. $15.00.

Q. Was that paid? A. Yes.

Q. Would you state whether or not that was for the use of this vehicle on August 22nd, 1954?

A. It was rent for the truck.

Q. For the use of the truck on August 22nd, 1954? A. Yes, sir.

Q. What was the amount of that that you billed him? [23] A. $15.00.

Q. And do you know how that was paid by the C. H. Elle Construction Company?

A. By check, with the rest of the bill.

Q. What happened to the check? Do you know?

A. It was deposited in the bank.

Q. And used in your account?

A. Yes, sir.

Q. Would you tell us whether or not you discussed this damage to your truck with any other representative of the Western Casualty and Surety Company except Mr. Mathews?

(Deposition of William S. Gagon.)

A. Later on; yes.

Q. And with whom did you discuss it?

A. I couldn't tell you his name. He was, I think, a special agent.

Q. Do you know where he came from?

A. Salt Lake.

Q. And you discussed what you understood as to the facts of this accident? A. Yes, sir.

Q. And this gentleman with whom you had the discussion was a, — represented himself to be an agent of Western Casualty and Surety Company?

A. Yes, sir.

Mr. Merrill: I believe that is all. Thank you, Mr. Gagon.

Cross Examination

Q. (By Judge Baum): This representative, before you discussed it with him, whom did you call?

A. I called my attorney, Mr. O. R. Baum.

Q. And your discussions pertained to the value of the truck, did it not? A. Yes, sir.

Q. And it didn't pertain to anything else, did it? Is that all? A. That is all.

Q. The value of the truck. That was many days later, was it not? A. Yes, considerable.

Q. How many days later would that be?

A. Oh, I couldn't say.

Q. Well, was it the following week, or a month or so?

A. I imagine it was ten or twelve days.

Q. You were asked about a $15.00 item. Do you know when that charge was made? [25]

(Deposition of William S. Gagon.)

A. It was made the sixth.

Q. The sixth of what? October?

A. October, I think.

Q. And there is an exhibit there,——

Judge Baum: Mr. Reporter, will you hand him that proposed exhibit?

Q. (Judge Baum, continuing): In whose handwriting is that exhibit?

A. That is my hand writing.

Q. And was that made on the date it bears?

A. Yes.

Q. And it was made by you, was it?

A. Yes.

Q. At whose direction?

A. At my attorney's, O. R. Baum's.

Q. Were you fully compensated for the loss of your truck? A. No.

Q. What did that bill have to do with reference to your loss that you had not been paid for?

A. It just reimbursed me for some of it.

Q. And do you know how you arrived at the amount? A. The amount of,—— [26]

Q. The amount of that bill?

A. Oh, we just figured that was about the right amount.

Q. Up until that time had any entry been made on any your books as to any rental?

A. No.

Q. Until this conversation was had with your attorney, at any time had there ever been any idea of you sending a statement for rent? A. No.

(Deposition of William S. Gagon.)

Q. Had you ever rented the truck to Mr. Horsley? A. No.

Q. Had you ever rented any other truck to Mr. Horsley at any time? A. No.

Q. Just speak up so the Reporter can hear you.

A. No.

Q. Had Mr. Horsley been a customer at your yard prior to August of 1954? A. Yes.

Q. For about how long?

A. Oh, five or six years.

Q. And he was in the construction business?

A. Yes. [27]

Q. Had Mr. Horsley at any time ever used your truck in connection with any purchases he had made from you? A. Yes.

A. For what purpose was that truck then used?

A. At times he would come in and place an order for me to deliver and there would be one of us there alone, and we would load our truck up and ask Mr. Horsley if he would deliver it and bring our truck back.

Q. And is that the only time that Mr. Horsley ever used your truck? A. Yes.

Q. Either before August or after that?

A. Yes.

Q. It was in reference to the sale of some merchandise by you? A. Yes, sir.

Q. Which you were obligated to deliver?

A. Yes.

Q. Did Mr. Elle, or any other of your agents, ever borrow your truck in August of 1954?

(Deposition of William S. Gagon.)

A. No.

Q. Or at any other time? A. No. [28]

Q. What is the fact as to whether or not you had ever authorized Mrs. Jessie Gagon to loan the truck in question?

Mr. Merrill: That is objected to as calling for a conclusion of the witness; incompetent, irrelevant and immaterial.

Q. (Judge Baum, continuing): You may answer, please. A. The question, please?

Judge Baum: Would you read it to him, Mr. Reporter, please?

(Whereupon, the pending question was read by the Reporter as above recorded.)

A. I never had authorized her.

Q. (Judge Baum, continuing): Did you at any time ever authorize Jessie Gagon to loan any of your equipment? A. No.

Q. Either before or after August of 1954?

A. No.

Q. Do you know of any occasion in the past where Jessie Gagon had loaned any of your equipment? A. No.

Q. Opposing counsel asked you something about Mr. Mathews. Do you recall what you said to Mr. Mathews? [29]

A. I went in to Mr. Mathews and told him the Chevrolet truck, the two-ton truck, had been in an accident, and I would like to have the adjustor come up so I could get a new truck and notify the company.

(Deposition of William S. Gagon.)

Q. And that is all you stated to him?

A. Yes, sir.

Q. Did you ever talk to him after that concerning that truck? A. No.

Q. Where did you sign your Proof of Loss in reference to that truck?

A. In Mr. O. R. Baum's office.

Q. From whom did you receive the papers you signed, the Proof of Loss?

A. The General Adjustment Bureau.

Q. And you took it where?

A. To my attorney, Mr. O. R. Baum.

Q. And left it there? A. Yes, sir.

Q. What is the fact, Mr. Gagon, as to whether or not if you had been home and Mr. Horsley would have asked you for the use of that truck for the use to which he was putting it, would you have loaned it to him? [30]

Mr. Merrill: That is objected to on the ground it is incompetent, irrelevant and immaterial, and on the further ground it calls for a conclusion of the witness.

A. No.

Q. (Judge Baum, continuing): In other words, as I understand you, unless it was in connection with the delivery of some merchandise you had sold, you would never have permitted anybody to use that truck; is that right? A. Yes.

Judge Baum: That is all.

(Deposition of William S. Gagon.)

Redirect Examination

Q. (By Mr. Merrill): Now, Mr. Gagon, you only talked to Mr. Mathews and the special agent so far as anyone connected with the Western Casualty and Surety Company is concerned?

A. Yes, sir.

Q. And from your discussion with this special agent from Salt Lake,—all you discussed was the value?

A. That is all I knew what to discuss.

Q. Did you and he arrive at a value?

A. No.

Q. Was any amount subsequently paid to you for the damage to the truck? [31] A. Yes.

Q. By the Western Casualty and Surety Company? A. Yes, sir.

Q. Did you ever sign any statement as to how the accident occurred, or what you knew about the facts of the accident? A. No.

Q. Did you ever discuss the actual facts of the accident with anybody?

A. I didn't know the actual facts.

Q. With anybody connected with the Western Casualty and Surety Company?

A. I didn't know the actual facts in regard to the wreck.

Q. Did you ever discuss what you did know?

A. I didn't know anything.

Q. You knew it was your truck? A. Yes.

Q. Did you discuss that fact with any agent of Western Casualty and Surety Company?

(Deposition of William S. Gagon.)

A. Yes, that it was my truck.

Q. You advised them of that? A. Yes.

Q. Did you advise them as to who was driving the truck? A. No.

Q. Did you advise them as to how he came into possession of the truck? A. No.

Q. You didn't talk with anyone of the Western Casualty on those facts?

A. He asked me questions and I answered them.

Q. Did you discuss any of those facts with him?

A. No.

Q. Did you answer any questions relative to that?

A. I might have. I don't know. There are too many questions.

Q. In August of 1954 about how many other employees did you have in the lumber yard?

A. One.

Q. And what is his name?

A. Walter Gagon.

Q. What?

A. Walter,—W-a-l-t-e-r,—Walter Gagon.

Q. Your son? A. Brother.

Q. A brother of yours. I see. [33]

A. Yes, sir.

Q. Now, you were asked as to how you arrived at the amount of $15.00, and you stated it was about the right amount. About the right amount for what? A. For the use of the truck.

Q. For the use of the truck on August 22nd, 1954? A. Yes, sir.

(Deposition of William S. Gagon.)

Mr. Merrill: I think that is all.

Recross Examination

Q. (By Judge Baum): You have rented trucks yourself, haven't you? A. I have rented?

Q. Yes, from other people? A. Yes, sir.

Q. And is that the way you arrived at what this charge should be? A. Yes, sir.

Judge Baum: That is all.

Mr. Merrill: That is all, Mr. Gagon. Thank you.

(Signing of deposition waived. See page three of this deposition.) [34]

Officer's Certificate Attached.

[Endorsed]: Filed November 26, 1956.

[Title of District Court and Cause.]

MOTION FOR PRODUCTION OF DOCUMENTS AND THINGS FOR INSPECTION, COPYING AND PHOTOGRAPHING

Comes Now the defendant, by its counsel of record, O. R. Baum, Ruby Y. Brown, and Ben Peterson, and respectfully moves the Court for an order requiring the plaintiff to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of certain documents, papers, letters or reports, not privileged, and which constitute or contain evidence material to the question of facts brought to the attention of the plaintiff immediately after the accident and during the time that the case in the state court was pending

and up to the time of the settlement, all of which matters are in the exclusive possession of the plaintiffs, their officers or agents. The documents, matters and things referred to are as follows:

I.

The written report made by the Yellowstone Adjustment Company of Pocatello, Idaho, which report was made to the St. Paul-Mercury Indemnity Company, a corporation, such report being a written report and one based upon the investigation that was made by the Yellowstone Adjustment Company at the request of the plaintiff, St. Paul-Mercury Indemnity Company, a corporation, or Merrill & Merrill.

II.

Letter of Merrill & Merrill addressed to the St. Paul-Mercury Indemnity Company, a corporation, which letter was written after the report of the investigation which was made by the Yellowstone Adjustment Company and such report was in the hands of Merrill & Merrill.

III.

Letter from the St. Paul-Mercury Indemnity Company to Merrill & Merrill directing that such firm handle the defense for the C. H. Elle Construction Company, the defendant in the State Court and one of the plaintiffs in the present case.

IV.

The letter wherein Merrill & Merrill were di-

rected by the St. Paul-Mercury Indemnity Company to handle all matters pertaining to the said accident that was referred to in the pleadings in the State Court on behalf of C. H. Elle Construction Company.

V.

Letter from Merrill & Merrill to St. Paul-Mercury Indemnity Company seeking authority to pay judgment in the District Court action, and the reply thereto authorizing the payment of the judgment obtained in the District Court against C. H. Elle Construction Company.

VI.

Letter from St. Paul-Mercury Indemnity Company authorizing Merrill & Merrill to institute the present action in the name of C. H. Elle Construction Company.

VII.

The information sought by the defendant is sought in good faith, and attached hereto and made a part hereof is the affidavit of defendant's attorney O. R. Baum, in support of this motion.

Dated this 29th day of November, 1956.

/s/ O. R. BAUM,
/s/ RUBY Y. BROWN,
/s/ BEN PETERSON,
Attorneys for Defendant.

AFFIDAVIT OF O. R. BAUM

State of Idaho,
County of Bannock—ss.

O. R. Baum, being first duly sworn, on his oath states:

That he is one of the attorneys for the above named defendant and he makes this affidavit in support of the Motion for Production of Documents and Things for Inspection, Copying and Photographing which is attached hereto; that the production of the documents, papers, statements and things requested is made in good faith; that he has been informed and therefore verily believes that the matters and things so sought in said motion are competent as evidence in said cause and are especially competent by reason of the fact that the defense in the action by the said C. H. Elle Construction Company was carried on at the direction of and under the control of the plaintiff St. Paul-Mercury Indemnity Company and that such company employed counsel and at all times was in full and complete control of said defense; that the facts sought to be elicited are facts necessary to be shown and produced in said cause in the furtherance of justice and in securing all the facts competent upon the issues to be tried.

That the adjustment made by the St. Paul-Mercury Indemnity Company was made without consultation or consent of said defendant as to the advisability of such adjustment being made.

That the said plaintiff herein, St. Paul-Mercury

Indemnity Company, was at all times aware of the defense as prepared and made by the said William S. Gagon in the said state court in the State of Idaho; that no appeal was taken to the Supreme Court of the State of Idaho; that an adjustment was made, all as hereinbefore stated.

The motion herein made is made in good faith and the affiant as one of counsel for defendant desires to inspect said documents solely for the purpose of establishing facts to be used as evidence in the above entitled cause and affiant does not intend to use said information for any other purpose or to convey the same to any other party or persons.

Dated this 29th day of November, 1956.

/s/ O. R. BAUM.

Subscribed and sworn to before me this 29th day of November, 1956.

[Seal] /s/ JAYSON C. HOLLADAY,
Notary Public for Idaho.
Residing at Pocatello, Idaho.

[Endorsed]: Filed November 30, 1956.

[Title of District Court and Cause.]

MINUTE ORDER
December 3, 1956

This case came on regularly this date in open court for hearing on defendant's Motion for production of Documents and things for Inspection, copying and photographing; Wesley Merrill appearing as counsel for Plaintiffs and O. R. Baum and Ben Peterson appearing for Defendant.

After hearing counsel for the respective parties and being advised in the premises, the Court granted the Motion.

[Title of District Court and Cause.]

MINUTE ORDER

December 7, 1956—Judge Clark

Upon this matter being re-set for Court Trial on Monday, December 10, 1956 at 10 o'clock A.M., and the Court being advised in the premises, it was Ordered that the setting be vacated and the matter be submitted on depositions and briefs, the plaintiff to have 20 days to file its opening brief, the defendant to have 20 days to reply to the opening brief and the plaintiff 10 days to reply to the defendant's brief.

[Title of District Court and Cause.]

DEPOSITION OF M. BURKE HORSLEY

Taken on behalf of the plaintiffs:

State of Idaho,
County of Bannock,
District of Idaho,
Eastern Division—ss.

M. Burke Horsley, of Soda Springs, County of Caribou, State of Idaho, a witness called by the plaintiffs herein, being duly cautioned and sworn to testify the whole truth, and being carefully examined, deposes and says as follows:

(Deposition of M. Burke Horsley.)

Mr. Merrill: It is stipulated between the parties through their respective counsel in this action that on this date, the 12th day of December, 1956, before Earl H. Weaver, a Notary Public for the State of Idaho, residing at Pocatello, Idaho, that the deposition of M. Burke Horsley may be taken on behalf of the plaintiffs. Wesley Merrill of Merrill & Merrill appearing for and on behalf of the [1*] plaintiffs, and O. R. Baum and Ben Peterson appearing on behalf of the defendant; that this deposition may be taken at the Courthouse in Pocatello, Bannock County, Idaho, at 1:30 o'clock p.m., December 12th, 1956.

Judge Baum: And that the deposition of C. H. Elle may be taken at this time on behalf of the defendant, and the same appearances as heretofore noted.

Mr. Merrill: And it may be stipulated that the depositions need not be signed.

Judge Baum: Yes.

Direct Examination

Q. (By Mr. Merrill): Will you please state your name? A. M. Burke Horsley.

Q. Where do you live?

A. Soda Springs, Idaho.

Q. Directing your attention to August, the 22nd, 1954, were you involved in an automobile accident on that date? A. I was.

* Page numbers appearing at bottom of page of Original Deposition.

(Deposition of M. Burke Horsley.)

Q. And for whom were you working?

A. C. H. Elle Construction Company.

Q. And approximately, what was the location of the accident? [2]

A. Approximately four miles west of Soda Springs.

Q. At the time of the accident would you state whether or not you were in your employment and working for the C. H. Elle Construction Company?

A. I was.

Q. Now, what day of the week was it?

Judge Baum: Just a minute. We will object at this time to this line of questioning, Mr. Merrill, it is all immaterial, and we move that the answer be stricken and likewise the previous answers.

Q. (By Mr. Merrill, resuming): What day of the week was it, this accident? A. Sunday.

Q. What vehicle were you driving?

A. Driving a two ton truck belonging to Mr. Wm. Gagon.

Q. That described as a 1954 truck? 1954 Chevrolet truck? A. Yes.

Q. And would you tell us, Mr. Horsley, who you contacted to get the truck?

Judge Baum: We object as being immaterial and not within the issues.

A. Mrs. William Gagon.

Q. And how did you contact her?

A. By telephone.

Q. And where was she? [3]

A. She was at her sister's.

(Deposition of M. Burke Horsley.)

Q. And you contacted her for what purpose?

A. For the purpose of borrowing the truck.

Q. And did you get the vehicle from her?

A. I did.

Q. Where did you go to get it?

A. To the lumber yard.

Q. And who was there?

A. Mrs. Gagon and myself.

Q. Did you see who unlocked the lumber yard?

A. Mrs. Gagon.

Q. How did you get the keys?

A. Mrs. Gagon gave them to me.

Q. At the time of your taking the vehicle at the lumber yard will you state whether or not there was any discussion as to the rental of it?

A. I think not.

Q. Was there any discussion as to payment of gas and oil consumed?

A. Not that I remember.

Q. Will you state whether or not Mrs. Gagon refused to give you the keys and permission to use the truck? A. No, she didn't.

Q. After this accident, Mr. Horsley, did you advise any one in the Gagon family as to the accident? [4]

A. I called the house from the hospital and Bill wasn't there and I talked to Mrs. Gagon.

Q. And you advised her of the accident?

A. I did.

Q. Did you have occasion at any time after this

(Deposition of M. Burke Horsley.)

accident to go by the scene of the accident with Mr. William Gagon?

A. Well, as I remember it he drove me to Grace the following day.

Q. The day after the accident?

A. The day after.

Q. And you went past the scene of the accident?

A. We went past the scene of the accident.

Q. Will you state whether or not you had ever been told by Mr. Gagon that you did not have permission to use the truck?

Judge Baum: We object on the ground it is incompetent, irrelevant and immaterial and not within the issues. Go ahead.

A. Not that I remember.

Q. (By Mr. Merrill, resuming): If there had been any criminal action filed against you based upon the use of that truck without permission you would know it? A. Not that I know of. [5]

Q. You would know it if there had been?

A. I undoubtedly would.

Q. Have you ever used any equipment of Mr. Gagon's before this one day?

A. I borrowed a truck from Mr. Gagon one time previously.

Q. For what purpose?

A. To haul steel forms from Pocatello to Grace.

Q. Who were you working for?

A. C. H. Elle Construction Company.

Q. Have you had any occasion to borrow or

(Deposition of M. Burke Horsley.)

use other equipment from the Gagon Lumber Company?

Judge Baum: Objected to as too general, incompetent, irrelevant and immaterial and not tied in with the present accident, or with the C. H. Elle Construction Company.

Q. (By Mr. Merrill, resuming): Let me add to that question prior to August 22nd, 1954?

A. The only time I can think of I used to use Mr. Gagon's concrete cement mixer. We buy cement from Mr. Gagon and we have used his concrete mixer.

Q. Now, by we who do you mean?

A. Myself.

Q. Yourself. You were not working for Mr. Elle? [6] A. No.

Q. Did you make any arrangements as to placing gasoline in the vehicle before you left town?

Judge Baum: We object to that as too general.

A. I don't understand that, Mr. Merrill.

Q. (By Mr. Merrill, resuming): Let me ask you this. Where did you go immediately after you left the lumber yard at the time you borrowed this vehicle?

A. As I remember I serviced the truck before I left.

Q. And by servicing the truck what do you mean?

A. I checked the oil and filled it with gas.

Q. Was that in line of your employment with Mr. Elle?

(Deposition of M. Burke Horsley.)

A. You might say it was in line. Of course, it is something that has to be done.

Q. Yes. I believe that is all.

Cross Examination

Q. (By Judge Baum): Mr. Horsley, you said that you had borrowed this truck once before from Mr. Gagon, tell us did you ever borrow this truck before from Mr. Gagon that you know of?

A. I am not sure that I borrowed it from Mr. Gagon. I did use the truck.

Q. When you answered counsel that you borrowed it from [7] Mr. Gagon that was not a correct answer, is that right?

A. No, I am not sure that I borrowed it from Mr. Gagon. I did use the truck.

Q. You used the truck one other time?

A. Yes.

Q. And you don't know from whom you got it, do you? A. No, I don't remember.

Q. Then you didn't intend to answer the question that you borrowed it from Mr. Gagon the other time, is that right? A. That is right.

Q. On this day that you got the truck, the day of the accident, you attempted to borrow other trucks, or another truck before contacting Mrs. Gagon?

Mr. Merrill: We will object to that upon the ground immaterial.

A. I did go to Mr. Corbett's house but he wasn't home.

(Deposition of M. Burke Horsley.)

Q. Then after that you called Mrs. Gagon?

A. Yes.

Q. Did you attempt to find Mr. Gagon that day?

A. Yes.

Q. And you were unable to do so?

A. He was out of town.

Q. When did you go to work for Mr. Elle? [8]

A. Approximately the first of August.

Q. And that was on a particular job, only?

A. Yes.

Q. And that job was what?

A. Curb and gutter.

Q. Where? A. Grace.

Q. Grace, Idaho. Was there any arrangement between you and Mr. Gagon while you were working for Mr. Elle to borrow his truck?

A. No, there was no direct understanding.

Q. You had used Mr. Gagon's trucks several times before, had you not?

A. Yes, I had used it previously.

Q. Under what circumstances was it?

A. In my own business to deliver merchandise.

Q. Purchased from whom? A. Gagon.

Q. And that was part of the understanding it was to be delivered?

A. To deliver merchandise, yes.

Q. On those occasions what would happen?

Mr. Merrill: Object to as immaterial.

A. Well, didn't have a delivery man and we needed material and had to load it and unload it.

(Deposition of M. Burke Horsley.)

Q. (By Judge Baum, resuming): And you would take his truck? A. Yes.

Q. And that is the only time you used Mr. Gagon's truck in getting material you purchased from him? A. Yes.

Q. Did Gagon have that same arrangement with other customers, do you know?

A. Well, I think so.

Q. You mentioned something about using a concrete mixer; was that on another job for yourself?

A. My own job, yes.

Q. It had nothing to do with this Grace job?

A. No.

Q. Did you on the day of the accident attempt to locate William Gagon first before you contacted Mrs. Gagon? A. Yes, I looked for Mr. Gagon.

Q. And you found he was where?

A. I understood that he was fishing; he was out of town.

Q. And it was after that then that you attempted to contact Mr. Corbett that you consulted with Mrs. Gagon? A. Yes, sir.

Judge Baum: That is all. [10]

Redirect Examination

Q. (By Mr. Merrill): Did you talk with Mr. Corbett before you tried to find Mr. Gagon?

A. I looked for Mr. Gagon first as I remember—it has been a long time ago. I think I looked for Mr. Gagon first and I was informed that he was out of town fishing and I think I drove up

(Deposition of M. Burke Horsley.)

to Mr. Corbett's home and he was out of town and then I called Mrs. Gagon.

Q. And it was from Mrs. Gagon that you got permission to use the truck? A. Yes, sir.

Mr. Merrill: That is all.

Judge Baum: That is all.

(Witness excused.) [11]

Judge Baum: It is stipulated between counsel that the present action was filed prior to the filing of the answer of the C. H. Elle Construction Company in the suit entitled Mary Lou Campbell, and others, versus the C. H. Elle Construction Company and William S. Gagon, and that the suit was originally entitled C. H. Elle Construction Company, a corporation, versus Western Casualty and Surety Company, and it was filed on September 19th, 1955, and that the trial of the action entitled Mary Lou Campbell, and others, versus C. H. Elle Construction Company was in December, 1955.

Mr. Merrill: Yes.

Judge Baum: We will call Mr. C. H. Elle.

C. H. ELLE

of the City of Pocatello, county of Bannock, and State of Idaho, a witness called on behalf of the defendant herein, being duly cautioned and sworn to testify the whole truth, and being carefully examined, deposes and says as follows:

Q. (By Judge Baum): Your name, please?

A. C. H. Elle.

(Deposition of C. H. Elle.)

Q. What connection have you with the C. H. Elle Construction Company?

A. I am the President.

Q. And were you President of that construction company during the year 1955? [12] A. Yes.

Q. You are acquainted with Mr. Burke Horsley? A. Yes.

Q. You and he were connected in having a job at Grace, Idaho? A. Yes, sir.

Q. Do you recall the suit of Mary Lou Campbell, and others, versus C. H. Elle Construction Company and M. Burke Horsley and other parties?

A. Yes, sir.

Q. Do you recall of a suit being filed in September, 1955, entitled C. H. Elle Construction Company, a corporation, versus Western Casualty and Surety Company, or did you know anything about it?

A. I didn't know C. H. Elle Construction Company.

Q. If it is a fact, Mr. Elle, that in September, 1955, a suit was filed in the United States District Court, for the District of Idaho, Eastern Division, entitled C. H. Elle Construction Company, a corporation, versus Western Casualty and Surety Company, did you know anything about that at the time of its filing?

A. No, I don't think that the Elle Company alone. I don't think the Elle Company alone was suing.

Q. If it is a fact that the C. H. Elle Construc-

(Deposition of C. H. Elle.)

tion Company was the only plaintiff, and the Western Casualty [13] and Surety Company was the defendant, and that the suit was filed in September, 1955, did you know anything about that suit?

A. I don't know that it was filed that way.

Q. Well, if it was filed that way did you know anything about it?

A. ——(No answer.)

Judge Baum: Well, we just stipulated it was filed that way, Mr. Elle.

Q. Did you have any understanding with W. S. Gagon, did you on behalf of the C. H. Elle Construction Company have any understanding with W. S. Gagon as to the use of any of his equipment in the Grace job? A. No.

Judge Baum: That is all.

Further Examination

Q. (By Mr. Merrill): Mr. Elle, have you or had you in the past borrowed from Mr. Gagon when you had jobs in that area?

A. I believe that we made one or two small rentals from him, yes. I think our records show that.

Q. Now, Mr. Elle, did you know of the filing, or was the filing of a suit against the Western Casualty and Surety Company discussed with you at any time? A. Yes. [14]

Q. By whom? A. By you.

Q. And that was prior to the time the suit was filed? A. Yes.

(Deposition of C. H. Elle.)

Q. You and I discussed the grounds, what it was going to be about and you knew that it was to be filed?

A. Well, I understood the insurance company was to file the suit.

Q. And that the C. H. Elle Construction Company was going to be involved?

A. The insurance company, through the insurance company.

Q. And who is the insurance company?

A. I understand St. Paul-Mercury was at that time.

Q. So that you were advised of the filing of this suit? A. We discussed it.

Q. And it was satisfactory to you, you gave your permission?

A. The insurance company do the suing.

Q. And the questions involved in this suit were discussed with you? A. Yes.

Q. And you understood what the suit was to be about? A. Yes.

Mr. Merrill: Thank you. That is all. [15]

Further Examination

Q. (By Judge Baum): In other words, you understood that the St. Paul-Mercury Indemnity was going to bring the suit, is that it?

A. Yes, sir.

Q. And not the C. H. Elle Construction Company? A. Yes.

Q. You said that you had several small rentals,

(Deposition of C. H. Elle.)

that was when, now, when did those rentals happen with Gagon?

A. I believe probably about the time we built the school down there.

Q. And about how many years ago was that?

A. I wouldn't be sure whether it was 1951 and 1952, or 1952 and 1953.

Q. And those items consisted of the rental of some buckets, didn't it? A. Yes.

Q. And consisted of $1.25 for each item, didn't it? A. Yes.

Q. And that is the only equipment that you had rented from him?

A. Yes, so far as I know.

Q. Well, you checked your records, did you not?

A. Yes. [16]

Q. And Mr. Merrill was out with your secretary and checked your records of your company?

A. Yes.

Judge Baum: That is all.

Mr. Merrill: That is all.

Judge Baum: That is all, Mr. Elle, thank you, sir.

(Witness excused.) [17]

Certificate of Notary Attached.

[Endorsed]: Filed December 18, 1956.

[Title of District Court and Cause.]

STIPULATION

It is Hereby Stipulated and Agreed by and between the parties in the above entitled matter, through their counsel of record, as follows:

I.

That the following listed documents are genuine, that their identification is admitted and that there is no objection on the grounds of their identification to the same being admitted as Exhibits in this action, reserving, however, the right of objection on all other grounds, said objections, if any, to be made in the Briefs of the respective parties to be hereinafter filed:

(a) The document attached hereto and marked Exhibit "A," designated as Second Amended Complaint in the case of Mary Lou Campbell, et al., vs. C. H. Elle Construction Company, et al.

(b) The document attached hereto and marked Exhibit "B," designated as Answer of William S. Gagon in the case of Mary Lou Campbell, et al., v. C. H. Elle Construction Company, et al.

(c) The document attached hereto and marked Exhibit "C," designated as Answer of C. H. Elle Construction Company in the case of Mary Lou Campbell, et al., v. C. H. Elle Construction Company.

(c - 1) The document attached hereto and marked Exhibit "C - 1," designated as Answer of M. Burke

Horsley in the case of Mary Lou Campbell, et al., v. C. H. Elle Construction Company, et al.

(d) The instrument attached hereto and marked Exhibit "d," designated as Verdict in the case of Mary Lou Campbell, et al., v. C. H. Elle Construction Company, et al.

(e) The instrument attached hereto and marked Exhibit "E," designated as Judgment on Verdict in the case of Mary Lou Campbell, et al., v. C. H. Elle Construction Company, et al.

(f) The instrument attached hereto and marked Exhibit "F," designated as "Order," which in truth and in fact is a Judgment signed by Henry McQuade, District Judge, granting judgment in favor of William F. Gagon in the case of Mary Lou Campbell et al., v. C. H. Elle Construction Company, et al.

(g) The instrument attached hereto and marked Exhibit "G," designated as Satisfaction of Judgment in the case of Mary Lou Campbell, et al., v. C. H. Elle Construction Company, et al.

(h) The two insurance policies, one issued by the St. Paul-Mercury Indemnity Company, being Policy 6210145, together with riders and endorsements; also Standard Combined Automobile Insurance Policy, U. I. 518973, issued by the defendant herein to William S. Gagon, Soda Springs, Idaho; or copies of the respective insurance policies; such policies handed to the Court with this Stipulation and being copies of the policies issued by the respective companies.

II.

That the instrument designated as S.R. 21, a copy of which has heretofore been attached to Plaintiffs' Additional Request for Admission, is a copy of the instrument on file with the Commissioner of Law Enforcement, State of Idaho, and there is no objection on the grounds of its identification to the same being admitted as an Exhibit in this action, all other objections however, are reserved by the defendant and will be set forth in its brief.

III.

The following is admitted:

(a) That the judgment in the case of Mary Lou Campbell, et al., v. C. H. Elle Construction Company, et al., was paid by the St. Paul-Mercury Indemnity Company on behalf of the C. H. Elle Construction Company, all in accordance with the allegations of paragraph XII of Plaintiffs' Amended and Supplemental Complaint.

(b) Payment of costs advanced and attorney's fees to Merrill & Merrill, Attorneys at Law, Pocatello, Idaho, who acted as the attorneys for the C. H. Elle Construction Company and M. Burke Horsley and Max Larsen, in the case of Mary Lou Campbell et al. v. C. H. Elle Construction Company, the amounts paid being $1500.00 for attorneys' fees and $139.53 for costs advanced, per attached statement.

IV.

It Is Further Stipulated that there be admitted in evidence all Requests for Admissions and Replies

to Requests for Admissions heretofore filed by the respective parties herein, reserving, however, all rights to objection to the evidence contained therein, which said objections, if any, are to be made in the briefs of the respective parties to be hereinafter filed.

V.

It Is Further Stipulated that each of the parties hereto reserves a right to urge in briefs all motions filed to said pleadings.

VI.

That the Depositions heretofore taken of Jessie Gagon, William S. Gagon and M. Burke Horsley and C. H. Elle be published and considered by the Court as evidence to the same extent as if said testimony was adduced during the trial, reserving the right, however, to object to evidence contained in said Depositions as to its relevancy, competency and materiality, said objections if any, to be made in the Briefs of the respective parties to be hereinafter filed.

VII.

That in the event the Court requests further and additional information, the same will be furnished by the parties by a stipulation or deposition.

VIII.

That the above entitled cause be herewith submitted to the Court for decision upon the files, record, this Stipulation, and the Depositions noted in Paragraph VI above.

Dated this 7th day of January, 1957.

MERRILL & MERRILL,
/s/ By W. F. MERRILL,
Attorneys for Plaintiffs.
/s/ O. R. BAUM,
/s/ RUBY Y. BROWN,
/s/ BEN PETERSON,
Attorneys for Defendant.

EXHIBIT "A"

In the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock

MARY LOU CAMPBELL, and TERRILL RAY CAMPBELL and CURTIS HOWARD CAMPBELL, Minors, by their Guardian Ad Litem, MARY LOU CAMPBELL,
Plaintiffs,

vs.

C. H. ELLE CONSTRUCTION CO., a corporation, M. BURKE HORSLEY, MAX LARSEN, and W. S. GAGON, Defendants.

SECOND AMENDED COMPLAINT

The plaintiffs complain and for cause of action against defendants, allege:

I.

That the plaintiff, Terrill Ray Campbell, is a minor of the age of six years; that Curtis Howard

Exhibit "A"—(Continued)

Campbell is a minor of the age of two years; that on February 28, 1955, Mary Lou Campbell was duly appointed Guardian Ad Litem of said Minor children.

II.

That at all times herein mentioned, Plaintiff Mary Lou Campbell and Arnold Campbell, now deceased, were husband and wife; that Mary Lou Campbell is the surviving widow of Arnold Campbell, deceased, and that Terrell Ray Campbell and Curtis Howard Campbell are the sole surviving children of the marriage of Mary Lou Campbell and Arnold Campbell, deceased, that said plaintiffs are the sole surviving heirs of Arnold Campbell.

III.

That the Defendant, C. H. Elle Construction Company is an Idaho corporation with principal place of business at Pocatello, Idaho.

IV.

That at all times mentioned herein, defendant, William S. Gagon, was the owner of a 1954 Chevrolet truck, bearing 1954 Idaho license, 3C-1010; that at such times the defendants, M. Burke Horsley and Max Larsen, were operating such truck with the permission and consent of the owner, William S. Gagon.

V.

That defendants, M. Burke Horsley and Max Larsen were residents of the State of Idaho, and on

Exhibit "A"—(Continued)

the 22nd day of August, 1954, were engaged as agents, servants or employees of the C. H. Elle Construction Company, and were at all times herein mentioned acting as such within the course and scope of their employment, in and were conveying on said truck a certain Scoopmobile, the property of defendant, C. H. Elle Construction Co. for use on a street and improvement contract then being carried out by said company.

VI.

That on the 22nd day of August, 1954, at approximately 7:35 p.m. and when it was dark, the defendant, M. Burke Horsley was driving and Max Larsen was riding, giving suggestions and directions and participating in the operation of the Chevrolet truck traveling in an easterly direction on U. S. Highway 30, North, at a point approximately 2½ miles west of Soda Springs, Caribou County, Idaho.

VII.

That at such time and place, the deceased Arnold Campbell was riding in and driving his automobile in a westerly direction on U. S. Highway 30, North, approximately 2½ miles west of Soda Springs, Idaho, in Caribou County. That at such time and place the Chevrolet truck was negligently operated in such fashion that the truck was caused to collide with the sedan in which Arnold Campbell was riding; that the injuries hereinafter set forth were caused solely and proximately by reason of the neg-

Exhibit "A"—(Continued)

ligence, carelessness and recklessness of the defendants and each of them in one or more of the following particulars:

a. In operating and permitting the operation of such truck, at 40 to 50 miles per hour, a speed greater than was reasonable and proper in view of the traffic, condition, surface and width of the road and particularly in view of the heavy scoopmobile then being carried by the truck at such time and place;

b. In operating and permitting the operation of the Chevrolet truck at such speed and in such manner as to endanger the life, limb and property of Arnold Campbell, deceased;

c. In driving or causing to be driven the said truck, or permitting it upon the left half of the highway;

d. In failing to give to the decedent, Arnold Campbell, at least one-half of the main traveled portion of the roadway as the vehicles approached from opposite directions;

e. In driving and permitting the operation of said truck at a time when it had been loaded by defendants Horsley and Larsen with a heavy scoopmobile which had not been firmly and properly secured in the bed of said truck.

That such negligence on the part of the defendants and each of them caused said truck to run into, collide with, and crush the automobile being driven by Arnold Campbell.

Exhibit "A"—(Continued)

VIII.

That by reason of such negligence of the defendants and each of them and as a direct and proximate result thereof, Arnold Campbell suffered a deep cut on the left eye below the bone, two broken ribs, dislocation of the left leg at the hips, crushed chest, a bruise of the head and other injuries which caused Arnold Campbell to die (illegible).

IX.

That directly and proximately by reason of carelessness and negligence of defendants and each of them, and as a direct and proximate result thereof, plaintiffs have been deprived of the companionship, support, society, aid and comfort of their husband and father, all to their further damage in the sum of $100,000.00.

Second Cause of Action

Plaintiffs replead all of the allegations contained in Paragraphs I through VIII of the First Cause of Action and refer to and incorporate the same in this cause of action as fully as though herein repleaded.

I.

That directly and proximately by reason of the carelessness, and negligence of the defendants and each of them, plaintiff, Mary Lou Campbell, has been further damaged in that Mary Lou Campbell was compelled to and did incur indebtedness in the sum of $780.00 for funeral and burial expenses of Arnold Campbell, and the further sum of $116.45

Exhibit "A"—(Continued)

for medical and hospital expenses in connection with the hospitalization and treatment of Arnold Campbell, following the accident, and prior to his death.

Third Cause of Action

Plaintiffs re-plead all of the allegations contained in Paragraphs I through VII of the First Cause of Action and refer to and incorporate the same in this cause of action as though they were again fully set forth herein.

I.

That by reason of the collision heretofore mentioned, the automobile belonging to the plaintiff, Mary Lou Campbell, and the deceased, Arnold Campbell, was so badly wrecked and damaged that it could not be restored or repaired; that the reasonable value of such automobile immediately prior to the collision was $1,750.00. That the reasonable value thereof immediately following the collision was $130.00; that directly and proximately as a result of the negligence and carelessness of the defendants as aforesaid, plaintiff, Mary Lou Campbell, has been further damaged in the sum of $1,620.00.

Wherefore, Plaintiffs pray judgment against the defendants and each of them as follows:

1. For the sum of $100,000.00 damages on the first cause of action.

2. For the sum of $896.45 on the second cause of action.

3. For the further sum of $1,620.00 on the third cause of action.

Exhibit "A"—(Continued)

4. For costs of suit.

55. For all other and further relief as to the court may seem just and proper and for all general relief.

GEE & HARGRAVES,

/s/ By MERRILL K. GEE,

Attorneys for Plaintiffs.

Duly Verified.

Acknowledgment of Service Attached.

[Endorsed]: Second Amended Complaint Filed August 16, 1955.

EXHIBIT "B"

[Title of District Court and Cause No. 18915.]

ANSWER OF DEFENDANT, W. S. GAGON

Comes now the defendant, W. S. Gagon, and as and for his answer to the second amended complaint of the said plaintiffs, alleges, affirms, admits and denies as follows:

I.

Defendant denies each and every allegation in said Second Amended Complaint contained, save and except those allegations hereinafter specifically admitted or modified.

II.

Answering paragraph I of said second amended complaint your answering defendant admits that on February 28, 1955, Mary Lou Campbell was duly appointed guardian ad litem, but states that he has not sufficient information in reference to the

Exhibit "B"—(Continued)

other allegations in said paragraph upon which to base an affirmation or denial and therefore denies the same.

III.

Answering paragraph II of said second amended complaint your answering defendant states that he has not sufficient information upon which to base an affirmation or denial upon the matters therein contained and therefore denies the same.

IV.

Answering paragraph III of said second amended complaint your answering defendant admits the same.

V.

Answering paragraph IV of said second amended complaint your answering defendant admits that he was the owner of a 1954 Chevrolet truck, bearing license 3C-1010, but denies the remaining part of said paragraph, to wit, the following:

> "that at such times the defendants, M. Burke Horsley and Max Larsen, were operating such truck with the permission and consent of the owner, William S. Gagon."

VI.

Answering paragraph V of said second amended complaint your answering defendant states that he has not sufficient information upon which to base an affirmation or denial of the same and therefore denies the allegations therein contained.

Exhibit "B"—(Continued)

VII.

Answering paragraph VI of said second amended complaint your answering defendant denies each and every allegation therein contained but states that he has been advised that M. Burke Horsley was, on the 22nd day of August, 1954, driving the Chevrolet truck referred to in said paragraph.

VIII.

Answering paragraph VII of said second amended complaint your answering defendant denies each and every allegation therein contained.

IX.

Answering paragraph VIII of said second amended complaint your answering defendant denies each and every allegation therein contained but states that the said Arnold Campbell received an injury in an automobile accident but as to the extent of said injury your answering defendant has not sufficient information upon which to base an affirmation or denial and therefore denies the same.

X.

Answering paragraph IX of said second amended complaint your answering defendant denies each and every allegation therein contained.

Answer to Second Cause of Action

Plaintiffs having adopted paragraphs I through VIII of their first cause of action as paragraphs I

Exhibit "B"—(Continued)

through VIII of their second cause of action, your answering defendant adopts paragraphs I through IX of his answer to plaintiffs' paragraphs I through VIII of their first cause of action as his answer to the adopted paragraphs I through VIII of plaintiffs' second cause of action, and further alleges:

X.

Answering paragraph I, so termed in the said second cause of action, your answering defendant states that he has no information upon which to base an affirmation or denial thereof and therefore denies the same.

Answer to Third Cause of Action

Plaintiffs having adopted paragraphs I through VII of their first cause of action as paragraphs I through VII of their third cause of action, your answering defendant adopts paragraphs I through VIII of his answer to plaintiffs' paragraphs I through VII of their first cause of action as his answer to the adopted paragraphs I through VII of plaintiffs' third cause of action and further alleges:

IX.

Answering paragraph I, so termed in the said third cause of action, your answering defendant denies the allegations therein contained.

First Affirmative Defense

Further answering said second amended complaint and as a first affirmative defense thereto your answering defendant states:

Exhibit "B"—(Continued)

I.

That the said Arnold Campbell, he being the husband of Mary Lou Campbell, did not exercise ordinary care, caution or prudence in the premises to avoid said accident, and the resulting injuries, if any, complained of were directly and proximately contributed to and caused by the fault, carelessness and negligence of the said Arnold Campbell in the premises, and the fault, carelessness and negligence of the said Arnold Campbell contributed to and caused whatever injuries the said Arnold Campbell received, and that such fault, negligence and carelessness of the said Arnold Campbell was and is imputed to the plaintiff, Mary Lou Campbell, she being the surviving spouse of said Arnold Campbell, deceased.

II.

That the said Arnold Campbell, he being the husband of Mary Lou Campbell, did not exercise ordinary care, caution or prudence in the premises to avoid said accident, and the resulting injuries, if any, complained of were directly and proximately contributed to and caused by the fault, carelessness and negligence of the said Arnold Campbell in the premises, and the fault, carelessness and negligence of the said Arnold Campbell were the sole causes of whatever injuries the said Arnold Campbell received, and that such fault, negligence and carelessness of the said Arnold Campbell was and is imputed to the plaintiff, Mary Lou Campbell, she

Exhibit "B"—(Continued)

being the surviving spouse of said Arnold Campbell, deceased.

Second Affirmative Defense

Further answering said second amended complaint and as a second affirmative defense thereto your answering defendant states:

I.

That the said Arnold Campbell, he being the deceased father of Terrell Ray Campbell and Curtis Howard Campbell, being minors, and being members of the household of Arnold Campbell and Mary Lou Campbell, did not exercise ordinary care, caution or prudence in the premises to avoid said accident, and the resulting injuries, if any, complained of were directly and proximately contributed to and caused by the fault, carelessness and negligence of the said Arnold Campbell in the premises, and the fault, carelessness and negligence of the said Arnold Campbell contributed to and caused whatever injuries the said Arnold Campbell received, and that such fault, negligence and carelessness of the said Arnold Campbell was and is imputed to the plaintiffs, Mary Lou Campbell, as guardian ad litem for Terrell Ray Campbell and Curtis Howard Campbell; and likewise is imputed to Curtis Howard Campbell and Terrell Ray Campbell, and each of them.

II.

That the said Arnold Campbell, he being the deceased father of Terrell Ray Campbell and Curtis

Exhibit "B"—(Continued)

Howard Campbell, being minors, and being members of the household of Arnold Campbell and Mary Lou Campbell, did not exercise ordinary care, caution or prudence in the premises to avoid said accident, and the resulting injuries, if any, complained of were directly and proximately contributed to and caused by the fault, carelessness and negligence of the said Arnold Campbell in the premises, and the fault, carelessness and negligence of the said Arnold Campbell were the sole causes of whatever injuries the said Arnold Campbell received, and that such fault, negligence and carelessness of the said Arnold Campbell was and is imputed to the plaintiffs, Mary Lou Campbell, as guardian ad litem for Terrell Ray Campbell and Curtis Howard Campbell, and likewise is imputed to Mary Lou Campbell, Curtis Howard Campbell and Terrell Ray Campbell, and each of them.

Third Affirmative Defense

Further answering said second amended complaint and as a third affirmative defense thereto your answering defendant states:

I.

That he is the owner of the truck described in paragraph IV of said second amended complaint, and that he has no responsibility or liability whatever in the matter, but that in the event the court should find that there was some liability on his part by his being the owner of such truck, that such lia-

Exhibit "B"—(Continued)

bility could not exceed the sum of $5,000.00 insofar as the matters and things referred to in said first cause of action; and not to exceed the sum of $1,000.00 by reason of the matters and things set forth in the said third cause of action. That as heretofore stated, your answering defendant alleges that he is in nowise responsible, or was he in anywise negligent in the matter, and he again asserts that he has no liability and should be dismissed from such suit.

Wherefore, defendant having fully answered prays that he be dismissed with his costs and that plaintiffs take nothing by reason of their second amended complaint.

/s/ O. R. BAUM,
/s/ RUBY Y. BROWN,
/s/ ISAAC McDOUGAL,
Attorneys for the Defendant,
W. S. Gagon.

Duly Verified.

[Endorsed]: Answer. Filed Oct. 1, 1955.

EXHIBIT "C"

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, C. H. ELLE CONSTRUCTION COMPANY

Comes now the defendant, C. H. Elle Construction Company, a corporation, and as its Answer to

Exhibit "C"—(Continued)

the Second Amended Complaint of the plaintiffs admits, denies and alleges as follows:

I.

Defendant, C. H. Elle Construction Company, denies each and every allegation in said Second Amended Complaint not hereinafter specifically admitted.

II.

Answering Paragraph I of said Second Amended Complaint, this answering defendant admits that on February 28, 1955, Mary Lou Campbell was duly appointed guardian ad litem, but states that it does not have any information or belief upon which to form an Answer and upon the ground denies each and every other allegation in said paragraph.

III.

Answering Paragraph II of said Second Amended Complaint, this answering defendant alleges that it has no information or belief to sufficiently form an Answer and upon this ground denies each and every allegation in said paragraph.

IV.

This defendant admits the allegations contained in Paragraph III of said Second Amended Complaint.

V.

Answering Paragraph IV of said Second Amended Complaint, this answering defendant admits that William S. Gagon was the owner of a

Exhibit "C"—(Continued)

1954 Chevrolet truck bearing 1954 Idaho license plates 3C - 1010, but denies each and every other allegation contained in said paragraph.

VI.

Answering Paragraph V of said Second Amended Complaint, this answering defendant admits that M. Burke Horsley was a resident of the State of Idaho on the 22nd day of August, 1954 and was engaged as agent and servant of this defendant and was conveying on a truck a certain scoopmobile, property of this defendant, but this answering defendant denies each and every other allegation contained in said paragraph.

VII.

Answering Paragraph VI of said Second Amended Complaint, this answering defendant admits that on the 22nd day of August, 1954, M. Burke Horsley was driving a Chevrolet truck East on U. S. Highway 30 at a point approximately 2½ miles West of Soda Springs, Idaho, but denies each and every other allegation contained in said paragraph.

VIII.

This answering defendant denies each and every allegation contained in Paragraph VII of said Second Amended Complaint.

IX.

Answering Paragraph VIII of said Second

Exhibit "C"—(Continued)

Amended Complaint, this answering defendant denies each and every allegation therein contained, but in this regard states that the said Arnold Campbell received injuries in an automobile accident, but that this answering defendant has no information or belief sufficient to form an Answer as to the extent of said injuries and upon that ground denies the same.

X.

This answering defendant denies the allegations contained in Paragraph IX of said Second Amended Complaint.

Answer to Second Cause of Action

Answering said Second Cause of Action, this answering defendant adopts Paragraph I through X of its Answer to Paragraph I through IX contained in plaintiffs' First Cause of Action as its Answer to the Paragraphs I through VIII of plaintiffs' First Cause of Action referred to and incorporated in said Second Cause of Action.

XI.

Answering the paragraph designated as I of said Second Cause of Action of said Second Amended Complaint, this answering defendant denies each and every allegation contained therein.

Answer to Third Cause of Action

Answering said Third Cause of Action, this answering defendant adopts Paragraph I through X of its Answer to Paragraph I through IX con-

Exhibit "C"—(Continued)

tained in plaintiffs' First Cause of Action as its Answer to the Paragraphs I through VIII of plaintiffs' First Cause of Action referred to and incorporated in said Third Cause of Action.

XI.

Answering the paragraph designated as I of said Third Cause of Action of said Second Amended Complaint, this answering defendant denies each and every allegation contained therein.

First Affirmative Defense

Further answering said Second Amended Complaint and as a first affirmative defense to all counts therein, this answering defendant alleges that at the time and place alleged in said Second Amended Complaint the said Arnold Campbell drove and operated his automobile in a negligent and careless manner and without ordinary caution or prudence to avoid said accident and the resulting injuries, if any, complained, were directly and proximately caused by the carelessness and negligence of the said Arnold Campbell which said carelessness and negligence is imputed to the plaintiff, Mary Lou Campbell, she being the surviving spouse of Arnold Campbell and this answering defendant relies upon the negligence of Arnold Campbell as a defense hereto.

Second Affirmative Defense

Further answering said Second Amended Complaint and as a second affirmative defense to all

Exhibit "C"—(Continued)

counts therein, this answering defendant alleges that at the time and place alleged in said Second Amended Complaint the said Arnold Campbell drove and operated his automobile in a negligent and careless manner and without ordinary caution or prudence to avoid said accident, and the resulting injuries, if any, complained of, were directly and proximately caused by the carelessness and negligence of the said Arnold Campbell which said carelessness and negligence is imputed to the said Terrell Ray Campbell and Curtis Howard Campbell, minors, they being the surviving children of the said Arnold Campbell, and this defendant relies upon the said negligence of Arnold Campbell as a defense herein.

Wherefore, this answering defendant having fully answered said Second Amended Complaint, prays that it be dismissed with its costs and that plaintiffs take nothing by reason of their Second Amended Complaint.

MERRILL & MERRILL,
/s/ By W. F. MERRILL,
Attorneys for defendant, C. H. Elle Construction Company.

Duly Verified.

Acknowledgment of Service Attached.

[Endorsed]: Answer. Filed Oct. 3, 1955.

EXHIBIT "C-1"

[Title of District Court and Cause.]

ANSWER OF DEFENDANT,
M. BURKE HORSLEY

Comes now the defendant, M. Burke Horsley, and as his Answer to the Second Amended Complaint of the plaintiffs admits, denies and alleges as follows:

I.

Defendant, M. Burke Horsley, denies each and every allegation in said Second Amended Complaint not hereinafter specifically admitted.

II.

Answering Paragraph I of said Second Amended Complaint, this answering defendant admits that on February 28, 1955, Mary Lou Campbell was duly appointed guardian ad litem, but states that he does not have any information or belief upon which to form an Answer and upon the ground denies each and every other allegation in said paragraph.

III.

Answering Paragraph II of said Second Amended Complaint this answering defendant alleges that he has no information or belief to sufficiently form an Answer and upon this ground denies each and every allegation in said paragraph.

IV.

This defendant admits the allegations contained

Exhibit "C-1"—(Continued)

in Paragraph III of said Second Amended Complaint.

V.

Answering Paragraph IV of said Second Amended Complaint, this answering defendant admits that William S. Gagon was the owner of a 1954 Chevrolet truck bearing 1954 Idaho license plates 3C-1010, but denies each and every other allegation contained in said paragraph.

VI.

Answering Paragraph V of said Second Amended Complaint, this answering defendant admits that he was a resident of the state of Idaho and on the 22nd day of August, 1954, was acting as agent and servant of C. H. Elle Construction Company and was conveying a certain scoopmobile, the property of C. H. Elle Construction Company, but denies each and every other allegation contained in said paragraph.

VII.

Answering Paragraph VI of said Second Amended Complaint, this answering defendant admits that on the 22nd day of August, 1954, he was driving a Chevrolet truck traveling in an Easterly direction on U. S. Highway 30 North at a point approximately 2½ miles West of Soda Springs, Idaho, but denies each and every other allegation contained in said paragraph.

VIII.

This answering defendant denies each and every

Exhibit "C-1"—(Continued)

allegation contained in Paragraph VII of said Second Amended Complaint.

IX.

Answering Paragraph VIII of said Second Amended Complaint, this answering defendant denies each and every allegation therein contained, but in this regard states that the said Arnold Campbell received injuries in an automobile accident, but that this answering defendant has no information or belief sufficient to form an Answer as to the extent of said injuries and upon that ground denies the same.

X.

This answering defendant denies the allegations contained in Paragraph IX of said Second Amended Complaint.

Answer to Second Cause of Action

Answering said Second Cause of Action, this answering defendant adopts Paragraphs I through X of his Answer to Paragraphs I through IX contained in Plaintiffs' First Cause of Action as his answer to the Paragraphs I through VIII of plaintiffs' First Cause of Action referred to and incorporated in said Second Cause of Action.

XI.

Answering the paragraph designated as I of said Second Cause of Action of said Second Amended Complaint, this answering defendant denies each and every allegation contained therein.

Exhibit "C-1"—(Continued)

Answer to Third Cause of Action

Answering said Third Cause of Action, this answering defendant adopts Paragraphs I through X of his Answer to Paragraphs 1 through IX contained in plaintiffs' First Cause of Action as his Answer to the Paragraphs I through VIII of plaintiffs' First Cause of Action referred to and incorporated in said Third Cause of Action.

XI.

Answering the paragraph designated as I of said Third Cause of Action of said Second Amended Complaint, this answering defendant denies each and every allegation contained therein.

First Affirmative Defense

Further answering said Second Amended Complaint and as a first affirmative defense to all counts therein, this answering defendant alleges that at the time and place alleged in said Second Amended Complaint the said Arnold Campbell drove and operated his automobile in a negligent and careless manner and without ordinary caution or prudence to avoid said accident and the resulting injuries, if any, complained of, were directly and proximately caused by the carelessness and negligence of the said Arnold Campbell which said carelessness and negligence is imputed to the plaintiff, Mary Lou Campbell, she being the surviving spouse of Arnold Campbell and this answering defendant relies upon the negligence of Arnold Campbell as a defense hereto.

Exhibit "C-1"—(Continued)

Second Affirmative Defense

Further answering said Second Amended Complaint and as a second affirmative defense to all counts therein, this answering defendant alleges that at the time and place alleged in said Second Amended Complaint the said Arnold Campbell drove and operated his automobile in a negligent and careless manner and without ordinary caution or prudence to avoid said accident, and the resulting injuries, if any, complained of, were directly and proximately caused by the carelessness and negligence of said Arnold Campbell which said carelessness and negligence is imputed to the said Terrell Ray Campbell and Curtis Howard Campbell, minors, they being the surviving children of the said Arnold Campbell, and this defendant relies upon the said negligence of Arnold Campbell as a defense herein.

Wherefore, this answering defendant having fully answered said Second Amended Complaint, prays that he be dismissed with his costs and that plaintiffs take nothing by reason of their Second Amended Complaint.

MERRILL & MERRILL,
/s/ By WESLEY F. MERRILL,
Attorneys for defendant,
M. Burke Horsley.

Duly Verified.

Acknowledgment of Service Attached.

EXHIBIT "D"

[Title of District Court and Cause No. 18915.]

VERDICT

We, the Jury in the above entitled cause, find for the plaintiffs and against the defendants, C. H. Elle Construction Company, a corporation, and M. Burke Horsley, and assess plaintiffs' damages in the sum of $15,000.

/s/ HENRY HALES,
Foreman.

[Endorsed]: Verdict. Filed Dec. 23, 1955.

EXHIBIT "E"

In the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock

No. 18915

MARY LOU CAMPBELL, and TERRELL RAY CAMPBELL, and HOWARD CAMPBELL, Minors, by their Guardian Ad Litem, MARY LOU CAMPBELL, Plaintiffs,

vs.

C. H. ELLE CONSTRUCTION COMPANY, a corporation, M. BURKE HORSLEY and W. S. GAGON, Defendants.

JUDGMENT ON VERDICT

This Cause came on regularly for trial. The said parties appeared by their attorneys. A jury of

Exhibit "E"—(Continued)

twelve persons was regularly empaneled and sworn to try said cause. Witnesses on the part of Plaintiff and Defendant were sworn and examined. After hearing evidence, the argument of Counsel and instructions of the Court, the Jury retired to consider their verdict, and subsequently returned into Court, and being called, answered to their names and say they find a verdict for the Plaintiffs and against the defendants, C. H. Elle Construction Company, a corporation, and M. Burke Horsley, and assess plaintiffs' damages in the sum of $15,-000.00.—Henry Hales, Foreman.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed that said Plaintiffs, Mary Lou Campbell and Terrell Ray Campbell, and Howard Campbell, minors, by their Guardian Ad Litem Mary Lou Campbell have and recover from said Defendants, C. H. Elle Construction Company, a corporation, and M. Burke Horsley the sum of Fifteen Thousand and No/100 ($15,000.00) Dollars, with interest thereon at the rate of 6 per cent per annum from the date hereof until paid, together with said costs and disbursement incurred in this action, amounting to the sum of Three Hundred Seventy-one and 40/100 ($371.40) Dollars.

Judgment rendered December 24th, A.D. 1955.

/s/ SARAH DEVANEY,
Clerk of the District Court.

[Endorsed]: Judgment. Filed Dec. 24, 1955.

[Note: Exhibit F "Order" is the same as set out at pages 40-41.]

EXHIBIT "G"

[Title of District Court and Cause.]

SATISFACTION OF JUDGMENT

For and in Consideration of the sum of Fifteen Thousand Three Hundred and Seventy One and 40/100 Dollars ($15,371.40) cash, lawful money of the United States, and the further consideration of the defendants, C. H. Elle Construction Company, a corporation, and M. Burke Horsley waiving their legal right to appeal said cause to the Supreme Court of the State of Idaho, and other valuable consideration, paid by and on behalf of the defendants C. H. Elle Construction Company, a corporation, and M. Burke Horsley, the receipt of all of which is hereby acknowledged, the undersigned, Mary Lou Campbell and Mary Lou Campbell, Guardian Ad Litem of Terrell Ray Campbell and Curtis Howard Campbell, Minors, and their attorneys of record, hereby acknowledge full and complete satisfaction and discharge of that certain judgment made and entered in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock, on the 23rd day of December, 1955 in favor of the above named plaintiffs and against the defendants C. H. Elle Construction Company, a corporation, and M. Burke Horsley, which said judgment is recorded in Book 20 of Judgments at Page 98, of the records

Exhibit "G"—(Continued)

of Bannock County, State of Idaho, and that said judgment shall hereafter be held for naught, and that the payment received by the undersigned shall operate as a full payment and settlement of said judgment, including principal, interest, and costs.

That the Clerk of the above entitled Court is hereby authorized and directed to enter full and complete satisfaction of record, and discharge said judgment and the whole thereof.

Dated this 18th day of April, 1956.

/s/ MARY LOU CAMPBELL,
/s/ MARY LOU CAMPBELL,
Guardian Ad Litem of Terrell Ray Campbell and Curtis Howard Campbell, Minors.

GEE & HARGRAVES,
/s/ By MERRILL K. GEE,
Attorneys of Record of the above named parties.

Duly Verified.

[Endorsed]: Satisfaction of Judgment. Filed June 13, 1956.

Pocatello, Idaho, January 6, 1956

St. Paul-Mercury Indemnity Company
200 Mills Building
San Francisco 6, California

Attention: Mr. J. B. Wallace

In Account With
MERRILL & MERRILL
Attorneys at Law
Pocatello, Idaho

Re: Campbell v. C. H. Elle Construction Co. et al.

Costs Advanced:

Filing appearances for C. H. Elle, M. Burke Horsley and Max Larson..$	15.00
Long Distance Telephone Calls:	
12-13-55 Soda Springs	.83
12-13-55 San Francisco	3.03
12-14-55 Soda Springs	1.43
12-14-55 Montpelier	.99
12-22-55 Montpelier	.17
12-30-55 San Francisco	6.45
Telegram to San Francisco.....	1.43
Witness Fees:	
Mark Wilson, travel 200 miles 4 days at trial	62.00
William Meccico, travel 75 miles 3 days at trial	27.75
Henry Parker, travel 1 mile, 3 days at trial	9.25
Travel to Soda Springs.....	11.20

Attorneys Fees:	
Appearances for C. H. Elle Construction Co., M. Burke Horsley, Max Larson, preparation and arguing Demurrer, preparation of pleadings, preparation and briefing for trial, trial of case beginning December 14, 1955 and ending December 23, 1955, resulting in verdict on behalf of Max Larson and against C. H. Elle Construction Co. and M. Burke Horsley.....	1,500.00
Total	$1,639.53

[Endorsed]: Filed January 13, 1957. Ed M. Bryan, Clerk.

[Title of District Court and Cause.]

OPINION

Clark, Chief Judge.

Prior to the accident which gives rise to this controversy, Western Casualty and Surety Company (hereinafter referred to as Western), Defendant herein, issued its Standard Combined Automobile policy to Wm. S. Gagon, as named insured, covering the truck involved. In that policy the occupation of the named insured is designated as "Lumber Business, builder, hardware dealer, self, Soda Springs" and Item 5 of the policy provides "Use: The purposes for which the automobile is to be used are Commercial Class 5CA.", and further

"The term 'commercial' is defined as use principally in the business occupation of the named insured as stated in Item 1, including occasional use for personal, pleasure, family and other business purposes."

The policy further provided:

"With respect to the insurance for bodily injury liability and for property damage liability the unqualified word 'insured' includes the named insured and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission."

The Plaintiff, St. Paul-Mercury Indemnity Company (hereinafter referred to as St. Paul-Mercury), had issued its multiple coverage policy to C. H. Elle Construction Company. Section A of the Insuring Agreement provides:

"Bodily Injury Liability (Including Automobile). The Company agrees to pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law or contract for damages, including damages for care and loss of services, because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person or persons."

This policy provided under the heading "Exclusions" as follows:

"This Insuring Agreement does not apply * * * under Section A (except with respect to liability

assumed under contract) 1. Bodily Injury to or sickness, disease or death of any employee of the named Insured while engaged in the employment of the Insured, other than domestic employees with respect to the operation, maintenance, or repair of an automobile."

At the time of the accident, August 22, 1954, both of these policies were in full force and effect. On that date, M. Burke Horsley, an employee of Elle Construction Company, one of the Plaintiffs herein, went to the home of Wm. S. Gagon, the named Insured under the Western policy, and made arrangements with Gagon's wife, Jessie, to "borrow" the 1954 Chevrolet truck covered by the policy.

While driving this truck, Horsley was involved in an accident in which a third-party, Arnold Campbell, sustained injuries as a result of which he died. It is not necessary to go into the facts of that accident as Horsley was found to have been negligent in the trial of the case of Mary Lou Campbell and others vs. Elle Construction Company, Horsley and Gagon, in the Fifth Judicial District of the State of Idaho, in and for Bannock County. Elle Construction Company was held liable under the doctrine of respondeat superior for Horsley's negligent acts committed within the scope of his employment. The Judgment in favor of Mrs. Campbell was paid by St. Paul-Mercury as Elle Construction Company's insurer, one of the plaintiffs herein.

It should be further noted that Wm. S. Gagon, who was made a party defendant by virtue of the Idaho statutes, was absolved of negligence, the jury

in the state court action bringing in a verdict in favor of Mr. Gagon and against the plaintiffs therein.

This suit was then instituted by St. Paul-Mercury, Elle's insurer, against Western, insurer of the truck owned by Gagon, to recover the amount paid under the judgment in favor of Mary Lou Campbell et al.

The matter has been presented to the Court on stipulation of counsel, which stipulation recites that the cause be submitted to the Court for decision upon the files, the records, the Stipulation and the depositions noted and on file herein. Counsel then presented their written briefs and arguments.

Several questions are presented for the Court's determination, and are as follows:

First, was Horsley using the vehicle with the permission of the named insured, thereby making him an insured under the Western policy, or as to this issue does the doctrine of collateral estoppel apply?

Second, does the coverage of the policy written by Western extend to the use to which the truck was put as set forth above, where its policy was designated as a commercial policy as defined therein.

Third, does the filing of an S.R. 21, under the laws of the State of Idaho, by an insurance company's agent, determine the liability of that insurance company?

Fourth, should the Court determine that the policies written by both companies provide coverage, which company has primary liability and which has secondary?

There are other questions incidental to these, and the Court sets these forth merely as the main issues involved.

The first question, as outlined above, must necessarily be determined at the outset, for if Horsley was not an insured under the policy, then Elle Construction Company was not an insured and there would be no liability on the part of Western.

It is the opinion of this Court that the verdict in the State Court action by which the jury found in favor of the insured Gagon, is conclusive as to the issue of whether Horsley was driving the vehicle with the owner's permission. By their verdict they found that he was not. That finding is conclusive on that issue and in that regard this Court need go no farther. New York Casualty Co. et al. vs. Superior Court in and for City and County of San Francisco, 85 P. 2d 965; Maryland Casualty Co. vs. Lopopolo, 97 F. 2d 554.

The Court has fully considered all of the questions presented in this matter. However, under the decision of the Court a determination of the remaining questions becomes unnecessary and immaterial.

Counsel for Defendant, Western Casualty and Surety Company, may prepare Findings, Conclusions and Judgment, submitting original to the Court and serving a copy on opposing counsel.

[Endorsed]: Filed Sept. 25, 1957.

[Title of District Court and Cause.]

EXCEPTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW AND PROPOSED AMENDMENTS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW

Come now the plaintiffs and except to the Proposed Findings of Fact and Conclusions of Law heretofore submitted by the defendant and further submit herewith Proposed Amendments to Findings of Fact and Conclusions of Law.

Findings of Fact

I.

Plaintiffs except to the Findings of Fact No. II upon the grounds and for the reason that the same is incomplete. Plaintiffs propose said Paragraph II but amended to add to said paragraph II the following:

"Said policy last referred to also contains the following provision:

'Other Insurance—No Insuring Agreement hereof shall apply to any loss if the Insured is, or would be but for the existence of such Insuring Agreement, insured against such loss under any other policy or policies, bond or bonds, except as respects any excess beyond the amount which would have been payable under any other such policy or policies, bond or bonds, had such Insuring Agreement not been effective.'"

II.

Plaintiffs except to Proposed Findings of Fact

No. III on the grounds that the same is inaccurate, not supported by the evidence and incomplete. Plaintiffs propose said Paragraph III be amended to read as follows:

"On August 22, 1954, the date of the accident, both of the aforementioned policies were in full force and effect. On that date, M. Burke Horsley, an employee of Elle Construction Company, one of the plaintiffs herein, made arrangements to borrow the 1954 Chevrolet truck owned by William J. Gagon and Jessie Gagon, husband and wife, by requesting the use of said truck from Jessie Gagon; that the said M. Burke Horsley went to the Gagon Company, a lumber yard, and received the keys to said truck from Jessie Gagon; that after the date of the accident, the said Gagon Lumber Company submitted a bill to Elle Construction Company in the amount of $15 for the use of said truck, which was paid; that after said accident, the Western Casualty and Surety Company, by and through its duly authorized agency, filed with the State of Idaho a certain document designated as SR-21, which said document, under oath, recited that the policy of the Western Casualty and Surety Company, Fort Scott, Kansas, applied to the operator of the vehicle, W. Burke Horsley, Soda Springs, Idaho."

III.

Plaintiffs except to Proposed Findings of Fact No. V on the grounds that the same is inaccurate, not supported by the evidence and incomplete. Plaintiffs propose said paragraph be amended as follows:

"William S. Gagon, who was a defendant in the action of Campbell, et al, v. Elle Construction Company, Horsley, and Gagon, in the State Court of the State of Idaho, having been made a defendant by virtue of the provisions of Section 49-1004, Idaho Code, the imputed negligence statute, secured a verdict in his favor in the said State Court action."

IV.

Plaintiffs proposed that said Findings of Fact be amended to add paragraph No. VII as follows:

"That the plaintiffs herein paid the Judgment in the State Court of the State of Idaho and the defendant is required to indemnify said plaintiffs in the amount of $13,630.93 plus interest."

Conclusions of Law

Plaintiffs except to the proposed Conclusions of Law on the grounds that the same are erroneous, not supported by the evidence, and against the law. Plaintiffs propose Conclusions of Law as follows:

I.

M. Burke Horsley, an employee of the plaintiff, Elle Construction Company, was using the vehicle of William S. Gagon, with permission, under the terms of that certain insurance policy issued by Western Casualty and Surety Company, in favor of William S. Gagon, insured.

II.

That the said Elle Construction Company was an organization legally responsible for the use of the vehicle within the terms of that certain insur-

ance policy issued by the Western Casualty and Surety Company in favor of William S. Gagon, insured.

III.

That under the terms of the above described insurance policy, the said M. Burke Horsley and Elle Construction Company became also insured, and said insurance coverage became the primary insurance coverage up to the limits of said policy.

IV.

That the use of the vehicle by M. Burke Horsley was within the coverage of the policy written by Western Casualty and Surety Company.

V.

That the plaintiffs herein, having paid the Judgment in the action in the State Court of the State of Idaho, are entitled to be indemnified in the amount of $13,630.93 plus interest and costs of this action.

Let Judgment enter.

Respectfully submitted,

MERRILL & MERRILL,
/s/ By W. F. MERRILL,
Attorneys for Plaintiffs.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Jan. 4, 1958.

[Title of District Court and Cause.]

ORDER

The Defendant, Western Casualty and Surety Company, prepared and submitted proposed Findings of Fact and Conclusions of Law as directed by the Court, and the Plaintiffs thereafter filed their objections and proposed amendments thereto, and

The Court, having fully considered the same, does

Hereby Order That the proposed Amendments and Objections to Findings of Fact and Conclusions of Law be, and the same are hereby, overruled.

Findings of Fact, Conclusions of Law, and Judgment will be filed as proposed as of this date.

Dated January 31, 1958.

/s/ CHASE A. CLARK,
Chief Judge, U. S. District
Court, District of Idaho.

[Endorsed]: Filed January 31, 1958.

In The United States District Court for the District of Idaho, Eastern Division

No. 1916

C. H. ELLE CONSTRUCTION CO., a corporation, and ST. PAUL-MERCURY INDEMNITY CO., a corporation, Plaintiffs,

vs.

WESTERN CASUALTY AND SURETY COMPANY, a corporation, Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT

Findings of Fact

I.

Prior to the accident which gave rise to this controversy, Western Casualty and Surety Company (hereinafter referred to as Western), defendant herein, issued its Standard Combined Automobile Policy to Wm. S. Gagon, as named insured, covering the truck involved. In that policy the occupation of the named insured is designated as "Lumber Business, builder, hardware dealer, self, Soda Springs." Such policy further provided that the automobile described therein is to be used as "Commercial Class 5CA." Said policy further provided: "The term 'commercial' is defined as use principally in the business occupation of the named insured as stated in Item 1, including occasional

use for personal, pleasure, family and other business purposes."

II.

The Western Casualty policy further provided with respect to the insurance for bodily injury liability and for property damage liability the unqualified word "insured", includes the named insured and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission.

The plaintiff, St. Paul-Mercury and Indemnity Company, (hereinafter referred to as St. Paul-Mercury), had issued its multiple coverage policy to C. H. Elle Construction Company. Section A of that policy provides:

"Bodily Injury Liability (Including Automobile). The Company agrees to pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law or contract for damages, including damages for care and loss of services, because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person or persons."

Said policy last referred to also contains the following provisions:

"This Insuring Agreement does not apply * * * under Section A (except with respect to liability assumed under contract) 1. Bodily Injury to or sickness, disease or death of any employee of the

named Insured while engaged in the employment of the Insured, other than domestic employees with respect to the operation, maintenance, or repair of an automobile."

III.

On August 22, 1954, the date of the accident, both of the aforementioned policies were in full force and effect. On that date M. Burke Horsley, an employee of Elle Construction Company, one of the plaintiffs herein, went to the home of Wm. S. Gagon, the named insured under the Western policy, and borrowed the key to the 1954 Chevrolet truck from Jessie Gagon, the wife of Wm. S. Gagon, the named insured in the Western policy.

V.

While operating this truck, M. Burke Horsley was involved in an accident from which Arnold Campbell sustained mortal injuries. Suit was brought for his death by Mary Lou Campbell, his widow, against Elle Construction Company, M. Burke Horsley, and Wm. S. Gagon, in the District Court of the Fifth Judicial District of the State of Idaho, in and for Bannock County. The jury trying said cause returned a verdict against Elle Construction Company predicated upon the doctrine of respondeat superior for Horsley's negligent operation of the truck in the course of his employment. The judgment thus rendered was paid by the plaintiff herein, St. Paul-Mercury as Elle Construction Company's insurer.

V.

Wm. S. Gagon, who was a defendant in said action, as aforementioned, by virtue of the Idaho statutes of owner's liability, obtained a verdict in his favor, the jury having found that the truck was not being operated with his permission and consent.

VI.

This action is one by St. Paul-Mercury, Elle's insurer, to recover against Western the amount they paid for Elle Construction to Mary Lou Campbell, et al.

From the foregoing Findings of Fact, the Court does hereby adopt the following

Conclusions of Law

That the verdict in the State Court action, above referred to, in which the jury found in favor of the insured Gagon operates as a final determination of the issue concerning the operation of the vehicle with the owner's consent. By such finding the jury concluded that M. Burke Horsley was not operating the car with the consent of William S. Gagon, and that question having been finally decided, such finding is not reviewable by this Court in the instant action, and that that determination in the case of Mary Lou Campbell vs. C. H. Elle Construction Company is final, conclusive, and binding upon the parties to this suit.

Let Judgment Enter.

The Court having heretofore made its certain Findings of Fact and adopted certain Conclusions of

Law, It Is Ordered that plaintiffs take nothing by virtue of their Amended Complaint, and that the action be dismissed, the defendant being awarded its costs.

/s/ CHASE A. CLARK,
Chief Judge, United States
District Court.

[Endorsed]: Filed January 31, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given, that C. H. Elle Construction Co., a corporation, and St. Paul-Mercury Indemnity Co., a corporation, Plaintiffs above named, Hereby Appeal to the United States Court of Appeals For The Ninth Circuit from the Final Judgment entered against them in this action on the 31st day of January, 1958, said Instrument being designated "Findings of Fact and Conclusions of Law and Judgment."

MERRILL & MERRILL,
/s/ By W. F. MERRILL,
Attorneys for Plaintiffs-
Appellants.

Acknowledgment of Service Attached.

[Endorsed]: Filed February 24, 1958.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men By These Presents: That the United States Fidelity and Guaranty Company, a corporation, as Surety, and C. H. Elle Construction Co., a corporation, and St. Paul-Mercury Indemnity Co., a corporation, as Principals, are held and firmly bound unto Western Casualty and Surety Company, a corporation, in the sum of Two Hundred Fifty Dollars ($250.00), to which we bind ourselves, our successors and assigns, jointly and severally.

Sealed with our hands and Dated this 24th day of February, 1958.

Whereas, on the 31st day of January, 1958, in the above entitled action in the United States District Court for the District of Idaho, Eastern Division, between C. H. Elle Construction Co., a corporation, and St. Paul-Mercury Indemnity Co., a corporation, Plaintiffs, and the said Western Casualty and Surety Company, a corporation, Defendant above named, a Judgment was rendered against said Plaintiffs, and said Plaintiffs have duly filed a Notice of Appeal from said Judgment;

Now, the condition of this Bond is that if said Appeal is disallowed, or the Judgment affirmed, all costs incurred by the Defendant or such costs as the Appellate Court may award in the event such Judgment is affirmed; that the payment of said costs is hereby secured; otherwise, the obligation is to be void.

The undersigned agree that this is a Bond on Appeal from the United States District Court for the District of Idaho, Eastern Division, to the United States Circuit Court of Appeals for the Ninth Circuit; given under the obligation of paragraph (C) of Rule 73 of the Federal Rules of Civil Procedure.

C. H. ELLE CONSTRUCTION CO.,
a corporation,
/s/ By W. F. MERRILL,
One of its Attorneys of Record.

ST. PAUL-MERCURY INDEMNITY CO., a corporation,
/s/ By W. F. MERRILL,
One of its Attorneys of record.
"Principals"

UNITED STATES FIDELITY AND GUARANTY COMPANY,
/s/ By F. F. TERRELL,
Its Attorney-in-fact.

[Seal] UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,
/s/ By F. F. TERRELL,
Resident Agent.

[Endorsed]: Filed February 24, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP):

1. Complaint.
2. Summons with return attached.
3. Defendant's motion to dismiss.
4. Affidavit of O. R. Baum.
5. Minutes of the court of Oct. 18, 1955.
6. Amended complaint.
7. Motion of C. H. Elle Const. Co., for inspection.
8. Affidavit in support of motion.
9. Minutes of the Court of Oct. 24, 1955.
10. Stipulation—10 days for defendant to enter appearance as to amended complaint after exchange of policies.
11. Affidavit for leave to file amended and supplemental complaint.
12. Motion for leave to file amended and supplemental complaint.
13. Amended and supplemental complaint.
14. Answer to amended and supplemental complaint.
15. Motion of defendant to dismiss action.

16. Motion of defendant to dismiss C. H. Elle Const. Co. from the cause.

17. Motion of defendant to dismiss St. Paul-Mercury Indemnity Co., from the action.

18. Defendant's demand for jury trial.

19. Notice requiring submission of motions on brief.

20. Motion of plaintiffs to strike from answer to amended and supplemental complaint.

21. Notice requiring submission of motions on brief.

22. Stipulation—10 additional days for both parties to file briefs.

23. Order—10 additional days for both parties to file briefs.

24. Minutes of the court of Oct. 8, 1956.

25. Request for admissions filed by plaintiff.

26. Response to request for admissions.

27. Defendant's request for admissions.

28. Defendant's withdrawal of request for trial by jury.

29. Notice of taking deposition of Wm. S. and Jessie Gagon.

30. Plaintiffs' additional request for admissions.

31. Response to defendant's request for admissions.

32. Response to plaintiffs' additional request for admissions.

33. Notice to present motion on Nov. 30, 1956.

34. Motion for production of documents, etc.

35. Depositions of Jessie Gagon and William S. Gagon.

36. Minutes of the court of Nov. 29, 1956.

37. Notice to present motion on Dec. 3, 1956.

38. Motion for production of documents, etc.

39. Minutes of the Court of Dec. 3, 1956.

40. Minutes of the Court of Dec. 7, 1956.

41. Depositions of M. Burke Horsley and C. H. Elle.

42. Stipulation to submit case on files and record.

43. Stipulation and order—time to file briefs.

44. Stipulation—15 additional days for defendant's brief ordered.

45. Stipulation—15 additional days for defendant's brief.

46. Opinion of Judge Clark.

47. Stipulation and order—Jan. 4, 1958 for filing objections to or response to Findings of Fact and Conclusions of Law.

48. Exceptions to findings of fact and conclusions of law and proposed amendments thereto.

49. Order overruling proposed amendments and objections.

50. Findings of fact and conclusions of law and judgment.

51. Acknowledgment of service of notice and bond on appeal.

52. Notice of appeal.

53. Bond on appeal.

54. Designation of record on appeal.

In Witness Whereof I have hereunto set my hand and affixed the seal of said court this 5th day of March, 1958.

[Seal] /s/ ED. M. BRYAN,
Clerk.

[Endorsed]: No. 15932. United States Court of Appeals for the Ninth Circuit. C. H. Elle Construction Co., a corporation and St. Paul-Mercury Indemnity Co., a corporation, Appellants, vs. Western Casualty and Surety Company, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Eastern Division.

Filed: March 10, 1958.

Docketed: March 17, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In The United States Court of Appeals,
For The Ninth Circuit

No. 15932

C. H. ELLE CONSTRUCTION CO., a corporation, and ST. PAUL-MERCURY INDEMNITY CO., a corporation,

Plaintiffs-Appellants,

vs.

WESTERN CASUALTY AND SURETY COMPANY, a corporation,

Defendant-Appellee.

STATEMENT OF POINTS ON APPEAL

Plaintiffs-Appellants herewith present their statement of points upon which they will rely on the Appeal in this matter.

I.

That the Trial Court erred in its Conclusions of Law that the Jury Verdict in the State Court action, designated in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock, and entitled Mary Lou Campbell, and Terrell Ray Campbell and Curtis Howard Campbell, minors, by their Guardian Ad Litem, Mary Lou Campbell, Plaintiffs, v. C. H. Elle Construction Co., a corporation, M. Burke Horsley, Max Larsen, and W. S. Gagon, Defendants, operated as a final determination of the issue as to whether or not the vehicle involved was being operated by the employee of C. H. Elle Construction Company with the consent of the named insured of the defendant herein.

II.

The Trial Court erred in its Finding of Fact V in findings as follows:

"The Jury, having found that the truck was not being operated with his permission and consent."

III.

That the Trial Court erred in entering Judgment in favor of the defendant and against the plaintiffs.

IV.

That the Trial Court erred in not holding, from the files, records and facts in this action, that the vehicle insured by Western Casualty and Surety Company was being operated at the time of the collision with the permission of the named insured under the terms and conditions of the insurance

policy issued by the defendant-appellee, Western Casualty and Surety Company.

V.

That the Trial Court erred in not holding that under the terms of the policy written by the defendant-appellee, Western Casualty and Surety Company, the said plaintiff-appellant herein, C. H. Elle Construction Company, became an also insured, and that the said insurance coverage became the primary insurance coverage up to the limits of the policy so issued by the defendant-appellee Western Casualty and Surety Company.

VI.

That the Trial Court erred in not determining that the use of the vehicle by one M. Burke Horsley as the employee of C. H. Elle Construction Company was within the coverage and uses set forth in the policy issued by the defendant-appellee Western Casualty and Surety Company.

VII.

That the Trial Court erred in not granting Judgment to the plaintiffs and against the defendant-appellee in the amount of $13,630.93, plus interest, plus costs of suit.

Dated this 17th day of March, 1958.

MERRILL & MERRILL,

/s/ By W. F. MERRILL,

Attorneys for Plaintiffs-Appellants.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 19, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Pursuant to Rule 75 (a) of the Federal Rules of Civil Procedure, the Plaintiffs-Appellants hereby designate for inclusion in the record on Appeal to the United States Court of Appeals for the Ninth Circuit, taken by Notice of Appeal filed the 24th day of February, 1958, the following portions of the record proceedings and evidence in this action:

1. Complaint.
2. Summons with Return attached.
3. Motion to Dismiss.
4. Record of Hearing of October 18, 1955.
5. Amended Complaint.
6. Motion for leave to file Amended and Supplemental Complaint.
7. Affidavit in support of Motion.
8. Amended and Supplemental Complaint.
9. Answer to Amended and Supplemental Complaint.
10. Motion to Dismiss St. Paul-Mercury Indemnity Co.
11. Motion to Dismiss C. H. Elle Construction Co.
12. Motion to Dismiss.
13. Motion to Strike from Answer to Amended & Supplemental Complaint.
14. Record of Hearing of October 8, 1956.

15. Requests for Admissions, filed Nov. 1, 1956.

16. Response to Requests for Admissions, filed Nov. 9, 1956.

17. Requests for Admissions, filed Nov. 9, 1956.

18. Response to Defendant's Request for Admissions, filed Nov. 19, 1956.

19. Plaintiffs' Additional Requests for Admissions, filed Nov. 19, 1956.

20. Response to Plaintiffs' Additional Requests for Admissions, filed Nov. 26, 1956.

21. Deposition of Jessie Gagon.

22. Deposition of Wm. S. Gagon.

23. Motion for Production of Documents, etc.

24. Record of Hearing of December 3, 1956.

25. Order to Submit on Depositions and Briefs, filed December 7, 1956.

26. Deposition of M. Burke Horsley.

27. Deposition of C. H. Elle.

28. Stipulation Re. Admissions and Submission of Cause on Records and Depositions, filed January 13, 1957.

29. Opinion.

30. Exception to Findings of Fact and Conclusions of Law, and Proposed Amendments to Findings of Fact and Conclusions of Law.

31. Order overruling Proposed Amendments and Objections to Findings of Fact; Conclusion.

32. Findings of Fact, Conclusions of Law, and Judgment.

33. Notice of Appeal.

34. Bond on Appeal.

35. Notice to Appellee.

36. Acknowledgment of Service.

37. Designation of Contents of Record on Appeal.

38. Statement of Points on Appeal.

Dated this 17th day of March, 1958.

MERRILL & MERRILL,
/s/ By W. F. MERRILL,
Attorneys for Plaintiffs-Appellants.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 19, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

MANDATE

United States of America, ss:

The President of the United States of America

To the Honorable, the Judges of the United States District Court for the District of Idaho, Eastern Division, Greeting:

Whereas, lately in the United States District Court for the District of Idaho, Eastern Division, before you or some of you, in a cause between C. H. Elle Construction Co., a corporation, et al., Plaintiffs, and Western Casualty & Surety Co., a corporation, Defendant, No. 1916, a Judgment was duly entered on the 31st day of January, 1958; which said Judgment is of record and fully set out in the office of the Clerk of the said District Court, to which record reference is hereby made and the same is hereby expressly made a part hereof,

And Whereas, the said C. H. Elle Construction Co., a corporation, et al., appealed to this Court as by the inspection of the transcript of the record of said District Court, which was brought into the United States Court of Appeals for the Ninth Circuit by virtue of an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

And Whereas, on the 30th day of December, in the year of our Lord, one thousand nine hundred and fifty-eight, the said cause came on to be heard

before the said United States Court of Appeals for the Ninth Circuit, on the said transcript of record, and was duly submitted:

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is reversed, with costs in favor of the Appellants, and against the Appellee, and that this cause be, and hereby is remanded to the said District Court for such further action as the trial court may deem proper and consistent with the views expressed in the opinion of this Court.

It is Further Ordered and adjudged by this Court, that the Appellants recover against the Appellee for their costs herein expended and have execution therefor.

(December 2, 1958)

You, Therefore, Are Hereby Commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Earl Warren, Chief Justice of the United States, the ninth day of February in the year of our Lord one thousand nine hundred and fifty-nine.

[Seal] PAUL P. O'BRIEN,
Clerk, United States Court of Appeals for the Ninth Circuit.

Costs

Clerk, Docket Fee, Court of Appeals	$ 25.00
Printing Record	617.15
Total	$642.15

United States Court of Appeals
for the Ninth Circuit

No. 15,932

C. H. ELLE CONSTRUCTION CO., a Corporation, and ST. PAUL-MERCURY INDEMNITY CO., a Corporation,

Appellants,

vs.

WESTERN CASUALTY AND SURETY COMPANY, a Corporation,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, EASTERN DIVISION

Before: Healy, Orr, and Pope, Circuit Judges.

Orr, Circuit Judge:

Appellant St. Paul-Mercury Indemnity Co., an insurer of appellant Elle Construction Co., paid a judgment rendered against said company by an Idaho State Court. In the instant action St. Paul-Mercury is attempting to recover from Western Casualty and Security Co., hereafter Western the amount it paid on the judgment.

The factual background follows. A Mr. Horsley, an employee of Elle Construction Co., while driving a truck belonging to a Mr. Gogan, and then and there being on Elle Construction Co. business collided with a vehicle driven by a Mr. Campbell who died as a result of injuries received in said collision. Campbell's widow and children sued Elle Construction Co., Horsley and Gogan and secured a judgment against Elle Construction Co. and Horsley. Gogan was exonerated on the basis of a finding by the jury that he had not given Horsley permission to drive the truck within the meaning of an Idaho Statute imputing negligence to the owner of a car when it is being driven with his permission. Idaho Code §49-1004.

The policy issued by Western to Gogan contained a so-called "omnibus clause" which covered anyone driving the truck with the owner's permission as a named insured and that in the event the named insured became liable, Western would become liable. Since St. Paul-Mercury's policy covering Elle Construction Co. contained a provision to the effect that its coverage would not apply if there was in existence at the time another policy covering the same accident, except as to any liability for an excess of the coverage over the existing additional policy, St. Paul-Mercury contends that the amount of the judgment paid by it is recoverable from Western because Western is primarily liable.

The trial court very properly recognized that in order for Western to become liable, in any event,

there must have been permission from Gogan to Horsley to drive the truck, but took the view that the verdict rendered in the state court and the judgment in favor of Gogan predicated thereon to the effect that Gogan had not given permission to Horsley to drive the truck "was conclusive on the issue of whether Horsley was driving the vehicle with the owner's permission."

The evident theory of the trial court was that the finding and judgment of the state court constituted an estoppel. For such an estoppel to arise there must have been a previous opportunity for litigation of the question, or an actual previous participation in the litigation, by the party against whom the estoppel is asserted or his privy. In the state court action appellants were not in an adversary position to Gogan in whose favor the judgment ran as Gogan, Elle Construction Co. and Horsley were all parties defendant. Plaintiffs in the state court were the only parties adverse to Gogan and appellant was not in privity with them. Collard v. Universal Automobile Insurance Co., 55 Idaho 560, 45 P.2d 288 (1935). There were no pleadings between appellants and Gogan, and the appellee was not a party to the state action. Hence, the issue of permissive use, either within the meaning of the Idaho statute or the insurance policy, has not yet been litigated by appellants or their privies against anyone; they have not yet had their day in court. The Restatement of Judgments (1942) aptly states the applicable law in Section 82:

> "The rendition of a judgment in an action does not conclude parties to the action who are not adversaries under the pleadings as to their rights inter se upon matters which they did not litigate, or have an opportunity to litigate, between themselves."

Although it is possible under Idaho procedure to file cross-complaints as to matters arising out of the same transaction against parties or non-parties (Idaho Code §5-617), that section is permissive only and does not foreclose one who has not taken advantage of it from asserting the matter later in a separate suit. Colorado National Bank of Denver v. The Meadow Creek Livestock Co., 36 Idaho 509, 211 Pac. 1076 (1922). Even if the rule were otherwise, the record before us fails to disclose that the subject matter which appellants seek to litigate in the instant case could have been presented in a cross-complaint under the Idaho Code. See Stearns v. Graves, 61 Idaho 233, 99 P.2d 955 (1940). The burden is on appellee, defendants below, to establish all elements of the affirmative defense of estoppel under Idaho law. See Collard v. Universal Automobile Insurance Co., 55 Idaho 560, 45 P.2d 288 (1935). As this is a diversity case, state law controls the issue of burden of proof. Cities Service Oil Co. v. Dunlap, 308 U.S. 208 (1939). Here, appellee has made no attempt at showing that it was a proper subject for a cross-complaint.

Appellant urges that this Court is in a position from the record before us to order judgment entered for it. We are not so persuaded. Questions re-

main whose solution is in the first instance exclusively with the trial court.

The judgment is reversed and the cause remanded for such further action as the trial court may deem proper and consistent with the views herein expressed.

Reversed.

[Endorsed]: Opinion. Filed December 2, 1958.

PAUL P. O'BRIEN,
Clerk.

[Endorsed]: Filed February 11, 1959.

In the United States District Court for the District of Idaho, Eastern Division

Case No. 1916-E

C. H. ELLE CONSTRUCTION CO., a Corporation, and ST. PAUL-MERCURY INDEMNITY CO., a Corporation,

Plaintiffs,

vs.

WESTERN CASUALTY AND SURETY COMPANY, a Corporation,

Defendant.

STIPULATION

It is Stipulated and Agreed by and between the attorneys representing the respective parties, that

the record as now made is by such counsel deemed to be complete and that neither side desires to submit additional proof; and

It Is Further Stipulated and Agreed that the matter is again resubmitted to the Honorable Chase A. Clark, United States District Judge, for further consideration, pursuant to the mandates of the Court of Appeals, Ninth Circuit, the only reservation being that each party is hereby privileged to file additional briefs in the matter, each side having sixty days in which to submit any additional brief or briefs.

Dated this 11th day of August, 1959.

MERRILL & MERRILL,

By /s/ W. F. MERRILL,

/s/ R. D. MERRILL,

/s/ A. L. MERRILL,

Attorneys for Plaintiffs.

/s/ O. R. BAUM,

/s/ BEN PETERSON,

Attorneys for Defendant.

[Endorsed]: Filed August 13, 1959.

[Title of District Court and Cause.]

MEMORANDUM

Appearances:

MERRILL AND MERRILL,
W. F. MERRILL, of Counsel,
Attorneys for Plaintiffs.

O. R. BAUM and
BEN PETERSON,
Attorneys for Defendant.

Clark, Chief Judge.

This matter is before the Court for further consideration pursuant to the mandate of the Court of Appeals, Ninth Circuit, filed herein February 11, 1959, it having been stipulated by counsel for the respective parties that the matter be resubmitted on the record and pleadings, including the depositions, on file herein.

The Court of Appeals having held that there has been no determination of the question which is binding on these plaintiffs, this Court is to determine whether or not Horsley was, at the time in question, driving the vehicle with the permission of the named insured, so as to make the said Horsley an insured under the provisions of the policy.

The named insured was one Wm. S. Gagon. The vehicle insured and involved herein was of a truck-type and was used in the operation of his business which was a lumber yard.

The Court has reviewed the pleadings, the depositions of Jessie Gagon, Wm. S. Gagon, M. Burke Horsley and C. H. Elle, and is of the opinion that the evidence is insufficient to show that Horsley was driving the vehicle with the permission, express or implied, of the named insured. This being true, there can be no recovery by the plaintiffs herein.

Counsel for Defendant may prepare Findings of Fact, Conclusions of Law and Judgment, submitting the original to the Court and serving a copy on opposing counsel.

[Endorsed]: Filed March 15, 1960.

[Title of District Court and Cause.]

PLAINTIFFS' PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Plaintiffs submit herewith Proposed Findings of Fact, Conclusions of Law and Judgment:

Findings of Fact

The Court finds:

I.

That the plaintiff, C. H. Elle Construction Co., a corporation, is a corporation duly organized and existing under the laws of the State of Idaho and is engaged in the general construction business in Pocatello, Bannock County, Idaho.

II.

That the plaintiff, St. Paul-Mercury Indemnity Co., a corporation, is a foreign corporation existing under the laws of Minnesota and is qualified and licensed to do business in the State of Idaho as a casualty company.

III.

That the defendant, Western Casualty and Surety Company, a corporation, is a foreign corporation existing under the laws of Kansas and is qualified to do business in the State of Idaho.

IV.

That the C. H. Elle Construction Company, a corporation, is a citizen of Idaho and the plaintiff, St. Paul-Mercury Indemnity Co., a corporation, is a citizen of Minnesota and that the Western Casualty and Surety Company, a corporation, is a citizen of Kansas and that the Court had jurisdiction of this matter.

V.

That the St. Paul-Mercury Indemnity Company, a corporation, had heretofore issued its policy of insurance insuring C. H. Elle Construction Company, a corporation, against loss from all such sums as the C. H. Elle Construction Company shall become obligated to pay by reason of liability imposed by law for bodily injury, said policy providing, however, as follows:

"Other Insurance—No insuring agreement hereof shall apply to any loss if the insured is, or would

be but for the existence of such insuring agreement, insured against such loss under any other policy or policies, bond or bonds, except as respects any excess beyond the amount which would have been payable under any other such policy or policies, bond or bonds, had such insuring agreement not been effective."

VI.

That the defendant, Western Casualty and Surety Company, a corporation, issued an automobile liability policy to William S. Gagon covering and insuring a certain 1954 Chevrolet two-ton truck, the truck involved herein; such policy provided insurance against public liability for personal injury in the amount of $10,000 for one person and for property damage in the amount of $10,000.

VII.

That on August 22, 1954, the date of the accident between M. Burke Horsley and Arnold Campbell, both of the aforementioned policies were in full force and effect. On said date, M. Burke Horsley, an employee of C. H. Elle Construction Co., made arrangements to borrow the said 1954 Chevrolet truck owned by William S. Gagon and Jessie Gagon, husband and wife, by requesting the use of said truck by Jessie Gagon; that the said M. Burke Horsley went to the Gagon Company, a lumber yard, and received the keys to said truck from Jessie Gagon; that after the date of the accident the said Gagon Lumber Company, submitted a statement to C. H.

Elle Construction Company in the amount of $15 for the use of said truck, which said amount was paid; that after said accident the Western Casualty and Surety Company, by and through its duly authorized agency, paid for and on behalf of the said William S. Gagon the collision feature of their policy; that after said accident, the Western Casualty and Surety Company, by and through its duly authorized agent, filed with the State of Idaho a certain document designated as SR-21, which said document, under oath, recited that the policy of the Western Casualty and Surety Company applied to the operator of the vehicle, W. Burke Horsley, Soda Springs, Idaho.

VIII.

That while operating said above-described Chevrolet truck, M. Burke Horsley was involved in an accident from which Arnold Campbell sustained fatal injuries. Suit was brought for his death by Mary Lou Campbell, his widow, against C. H. Elle Construction Company, M. Burke Horsley, and William S. Gagon in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock; that the result of said trial was a verdict against M. Burke Horsley and C. H. Elle Construction Co. in an amount of $15,000, plus costs; that said verdict, in the total amount of $15,371.40, was paid and satisfied on behalf of the C. H. Elle Construction Co., a corporation, and M. Burke Horsley, by the plaintiff, St. Paul-Mercury Indemnity Co., a corporation.

IX.

That said policy of insurance heretofore issued by the Western Casualty and Surety Company provided, in part, as follows:

"With respect to the insurance for bodily injury liability and for property damage liability, the unqualified word 'insured' includes the named insured and also includes any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission."

X.

That the said 1954 Chevrolet truck owned by William S. Gagon and Jessie Gagon, at the time of the accident in which Arnold Campbell was killed, was being used with the permission of the named insured in that policy issued by Western Casualty and Surety Company.

Conclusions of Law

I.

M. Burke Horsley, an employee of C. H. Elle Construction Company, was using the 1954 Chevrolet truck, insured by Western Casualty and Surety Company, with the permission of the named insured, under the terms and provisions of that certain insurance policy No. UI 518973, issued by Western Casualty and Surety Company in favor of William S. Gagon, insured.

II.

That the said C. H. Elle Construction Company was an organization legally responsible for the use

of the vehicle within the terms of that certain insurance policy issued by Western Casualty and Surety Company in favor of William S. Gagon, insured.

III.

That under the terms of the above-described insurance policy, the said M. Burke Horsley and C. H. Elle Construction Company became also insured, and said insurance coverage became the primary insurance coverage on behalf of the said M. Burke Horsley and C. H. Elle Construction Company, up to the limits of said policy.

IV.

That the plaintiffs herein, having paid the judgment in the action in the State Court of the State of Idaho, are entitled to be indemnified in the amount of $13,630.93, plus interest from the 18th day of April, 1956, the date of satisfaction of said judgment, together with costs of this action.

Let judgment enter.

Respectfully submitted,

MERRILL & MERRILL,

By /s/ W. F. MERRILL,
Attorneys for Plaintiffs.

Affidavit of mail attached.

[Endorsed]: Filed April 12, 1960.

[Title of District Court and Cause.]

EXCEPTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW

Come Now the plaintiffs and except to the Findings of Fact and Conclusions of Law heretofore submitted by the defendant, said Exceptions being filed pursuant to Rule 15 of the Rules of the United States District Court for the District of Idaho, and Rule 52, Federal Rules of Civil Procedure.

Exceptions to Findings of Fact

I.

Plaintiffs except to Finding of Fact No. V upon the grounds and for the reason that the same is incomplete in that said policy referred to also contains the following provision:

"Other Insurance—No insuring agreement hereof shall apply to any loss if the insured is, or would be but for the existence of such insuring agreement, insured against such loss under any other policy or policies, bond or bonds, except as respects any excess beyond the amount which would have been payable under any other such policy or policies, bond or bonds, had such insuring agreement not been effective."

II.

Plaintiffs except to that portion of Finding of Fact No. VII:

"* * * That the vehicle owned by William S. Gagon, insured by Western Casualty and

Surety Company, a corporation, was being driven by M. Burke Horsley without the permission, express or implied, of the named insured in said policy, namely, William S. Gagon.

"That at no time previous to this occasion had M. Burke Horsley borrowed said truck or used said truck as an employee of the C. H. Elle Construction Company, or any other truck owned by William S. Gagon, in the furtherance of either his business or that of the C. H. Elle Construction Company."

on the grounds and for the reason that the same is not supported by the evidence and is contrary to law.

III.

Plaintiffs except to Finding of Fact No. X on the ground that the same is contrary to the evidence.

IV.

Plaintiffs except to that portion of Finding of Fact No. XI as follows:

"* * * That the truck was not being used with the knowledge or permission, express or implied, of the named insured in said policy, nor was the lending ever ratified by said named insured nor did said named insured, at said time or at any other time, directly or indirectly, authorize M. Burke Horsley, or grant permission to him, to use said truck in the employ of C. H. Elle Construction Company, nor had Jessie Gagon on said date, or any other

> date, loaned the equipment of this particular truck to M. Burke Horsley or to any other person; * * *"

upon the grounds and for the reason that the same is not supported by the evidence and is contrary to law.

V.

Plaintiffs except to Finding of Fact No. XII upon the grounds that the same is not supported by the evidence adduced at said trial.

VI.

Plaintiffs except to Finding of Fact No. XIII upon the grounds that the same is contrary to the evidence and contrary to law.

Exceptions to Conclusions of Law

I.

Plaintiffs except to Conclusions of Law I, II, IV and V upon the grounds that the same are not supported by the evidence in said case and that the evidence is conclusively to the contrary and that the same are contrary to law.

II.

Plaintiffs except to Conclusions of Law No. III upon the ground that the same is contrary to the evidence adduced and is contrary to law in that the evidence is conclusive that the defendant, Western Casualty and Surety Company, under its policy, had the primary obligation of defense and payment of damages up to the limits of its policy.

Respectfully submitted,

MERRILL & MERRILL,

By /s/ W. MERRILL.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 12, 1960.

[Title of District Court and Cause.]

ORDER

Pursuant to the Memorandum of the Court filed herein March 15, 1960, the Defendant submitted its proposed Findings of Fact, Conclusions of Law and Judgment to which the Plaintiffs have duly filed their Exceptions and have also submitted their proposed Findings, Conclusions and Judgment. The Court has fully considered the same and it appears that the exceptions are without merit and therefore,

It is hereby Ordered That the exceptions be and the same are hereby Overruled.

Dated this 5th day of May, 1960.

/s/ CHASE A. CLARK,
Chief Judge, United States District Court, District of Idaho.

[Endorsed]: Filed May 5, 1960.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

The Court finds:

I.

That the Plaintiff, C. H. Elle Construction Co., a corporation, is a corporation duly organized and existing under the laws of the State of Idaho and is engaged in the general construction business in Pocatello, Bannock County, Idaho.

II.

That the Plaintiff, St. Paul-Mercury Indemnity Co., a corporation, is a foreign corporation existing under the laws of Minnesota and is qualified and licensed to do business in the State of Idaho as a casualty company.

III.

That the Defendant, Western Casualty and Surety Company, a corporation, is a foreign corporation existing under the laws of Kansas and is qualified to do business in the State of Idaho.

IV.

That the C. H. Elle Construction Company, a corporation, is a citizen of Idaho and the Plaintiff, St. Paul-Mercury Indemnity Co., a corporation, is a citizen of Minnesota and that the Western Cas-

ualty and Surety Company, a corporation, is a citizen of Kansas and that the Court had jurisdiction of this matter.

V.

That the St. Paul-Mercury Indemnity Co., a corporation, had heretofore issued its policy of insurance insuring C. H. Elle Construction Co., a corporation, against loss from all such sums as C. H. Elle Construction Company shall become obligated to pay by reason of liability imposed by law for bodily injury.

VI.

That the defendant, Western Casualty and Surety Company, a corporation, issued an automobile liability policy to William S. Gagon in which said policy a certain 1954 Chevrolet, 2-ton truck was described; such policy insuring against public liability for personal injury in the amount of $10,000.00, each person, and for property damage in the amount of $10,000.00, each accident.

VII.

That on or about the 22nd day of August, 1954, and heretofore, and at all times before that date, the said Chevrolet truck described in said policy of insurance was used exclusively in the lumber yard business of the William S. Gagon Company; that the 22nd day of August, 1954, was a Sunday and on or about that date, and previously thereto, one M. Burke Horsley was an employee of C. H. Elle Construction Company and in such capacity

on said date attempted to contact the named insured, William S. Gagon, the owner of said truck and the insured in said Western Casualty Company policy. Mr. Gagon, on said day, was out of town and not available; that M. Burke Horsley called Mrs. Jessie Gagon at her home and borrowed the truck from her and she obtained the keys for him at the lumber yard; that the vehicle owned by William S. Gagon, insured by Western Casualty and Surety Company, a corporation, was being driven by M. Burke Horsley without the permission, express or implied, of the named insured in said policy, namely, William S. Gagon.

That at no time previous to this occasion had M. Burke Horsley borrowed said truck or used said truck as an employee of the C. H. Elle Construction Company, or any other truck owned by William S. Gagon, in the furtherance of either his business or that of the C. H. Elle Construction Company.

VIII.

That said policy of insurance heretofore issued by the Western Casualty and Surety Company, a corporation, provides, in Paragraph 3 thereof, as follows:

"With respect to the insurance for bodily injury liability and for property damage liability the unqualified word 'insured' includes the named insured and also includes any person or organization legally responsible for the use thereof, provided the actual

use of the automobile is by the named insured or with his permission."

IX.

The policy of insurance issued by the Western Casualty and Surety Company, a corporation, Defendant, provides as follows:

Name of Insured: William S. Gagon.

Address: Soda Springs, Caribou County, Idaho.

Occupation of named insured: Lumber business, Builder, Hardware Dealer, Self, Soda Springs.

X.

That at no time previous to this occasion had M. Burke Horsley, C. H. Elle Construction Co., a corporation, or any other of the C. H. Elle Construction employees ever borrowed this truck or any other truck owned by William S. Gagon.

XI.

That after taking said truck and driving away from the Gagon Lumber Yard, M. Burke Horsley was involved in an accident, the result of which a certain Arnold Campbell was killed; that the truck was not being used with the knowledge or permission, express or implied, of the named insured in said policy nor was the lending ever ratified by said named insured nor did said named insured, at said time or at any other time, directly or indirectly, authorize M. Burke Horsley, or grant permission to him, to use said truck in the employ of C. H.

Elle Construction Company, nor had Jessie Gagon on said date, or any other date, loaned the equipment of this particular truck to M. Burke Horsley or to any other person; that the said Jessie Gagon was not named in said policy of insurance and was not a named insured in said policy written by the Western Casualty and Surety Company, a corporation.

XII.

That the said Jessie Gagon kept the books of the Gagon Lumber Yard but had nothing to do with the buying or selling or handling of the business affairs of said lumber yard, save and except in the capacity of keeping books at the place of business; that the said Jessie Gagon was not named in said policy of insurance issued by the Western Casualty and Surety Company, a corporation, as an insured.

XIII.

That the said 1954 Chevrolet truck owned by William S. Gagon, at the time of the accident in which Arnold Campbell was killed, was not being used with the knowledge or permission of the named insured in said policy.

Conclusions of Law

From the foregoing Findings of Fact the Court makes the following Conclusions of Law:

I.

That on or about the 22nd day of August, 1954, the truck being driven by M. Burke Horsley was

not being driven by him with the permission or consent of the named insured, namely, William S. Gagon, nor was the use thereof ever ratified by the named insured.

II.

That the said truck, at said time and place of the accident, not being driven with the permission of the named insured, the said policy of insurance issued by the Western Casualty and Surety Company, a corporation, did not insure M. Burke Horsley or C. H. Elle Construction Company, a corporation, or either of them, against any legally imposed liability.

III.

That at the time of the accident in which Arnold Campbell was killed, the plaintiff herein, as set forth in said Findings of Fact, namely, the St. Paul-Mercury Indemnity Co., a corporation, had issued a policy of insurance which did insure C. H. Elle Construction Company, a corporation, and M. Burke Horsley in the operation of said truck for which the said plaintiff, St. Paul-Mercury Indemnity Co., a corporation, did have an obligation to pay said Judgment against M. Burke Horsley and against C. H. Elle Construction Company, a corporation, and which said Judgment and costs were paid.

IV.

That the said St. Paul-Mercury Indemnity Co., a corporation, plaintiff herein, does not have any

claim against the defendant, Western Casualty and Surety Company, a corporation, nor does the Western Casualty and Surety Company, a corporation, defendant herein, have any legal obligation to pay the plaintiff, St. Paul-Mercury Indemnity Co., a corporation, the amount of the Judgment rendered against C. H. Elle Construction Company, a corporation, and M. Burke Horsley on account of the death of Arnold Campbell.

V.

That the said 1954 Chevrolet truck owned by William S. Gagon at the time it was involved in an accident when being driven by M. Burke Horsley, was not being driven with the permission, express or implied, of the named insured in said policy, namely, William S. Gagon.

Dated this 5th day of May, 1960.

/s/ CHASE A. CLARK,
Chief Judge, United States District Court, District of Idaho.

[Endorsed]: Filed May 5, 1960.

In the United States District Court for the District of Idaho, Eastern Division

No. 1916-E

C. H. ELLE CONSTRUCTION CO., a Corporation, and ST. PAUL-MERCURY INDEMNITY CO., a Corporation,

Plaintiffs,

vs.

WESTERN CASUALTY AND SURETY COMPANY, a Corporation,

Defendant.

JUDGMENT

The above-entitled matter having been submitted to the Court on Stipulations, Request for Admissions and Depositions, and the Court having fully considered such evidence, and each side having filed Briefs with the Court, and the Court being fully advised in the premises, and the Court having made Findings of Fact and Conclusions of Law;

It Is Ordered, Adjudged and Decreed by the Court that the Plaintiffs take nothing by reason of said Complaint and that said action be dismissed and that the defendant be allowed its costs incurred herein.

Dated this 5th day of May, 1960.

/s/ CHASE A. CLARK,
United States District Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 5, 1960.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given, that C. H. Elle Construction Co., a corporation, and St. Paul-Mercury Indemnity Co., a corporation, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered against them in this action on the 5th day of May, 1960, said instrument being designated "Judgment."

MERRILL & MERRILL,

By /s/ W. F. MERRILL,
Attorneys for Plaintiffs-Appellants.

[Endorsed]: Filed May 20, 1960.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents:

That the United States Fidelity and Guaranty Company, a corporation, as Surety, and C. H. Elle Construction Co., a corporation, and St. Paul-Mercury Indemnity Co., a corporation, as Principals, are held and firmly bound unto Western Casualty and Surety Company, a corporation, in the sum of Two Hundred Fifty Dollars ($250.00), to which

we bind ourselves, our successors and assigns, jointly and severally.

Sealed with our hands and Dated this 20th day of May, 1960.

Whereas, on the 5th day of May, 1960, in the above-entitled action in the United States District Court for the District of Idaho, Eastern Division, between C. H. Elle Construction Co., a corporation, and St. Paul-Mercury Indemnity Co., a corporation, Plaintiffs, and the said Western Casualty and Surety Company, a corporation, Defendant above named, a Judgment was rendered against said Plaintiffs and said Plaintiffs have duly filed a Notice of Appeal from said Judgment;

Now, the condition of this Bond is that if said Appeal is disallowed, or the Judgment affirmed, all costs incurred by the Defendant or such costs as the Appellate Court may award in the event such Judgment is affirmed; that the payment of said costs is hereby secured; otherwise, the obligation is to be void.

The undersigned agree that this is a Bond on Appeal from the United States District Court for the District of Idaho, Eastern Division, to the United States Court of Appeals for the Ninth Circuit; given under the obligation of paragraph (C) of Rule 73 of the Federal Rules of Civil Procedure.

C. H. ELLE CONSTRUCTION CO.,
A Corporation, Principal;

18. Demand for jury trial by defendant.

19. Notice requiring submission of motions on brief.

20. Motion of plaintiffs to strike from answer to amended and supplemental complaint.

21. Notice requiring submission of motions on brief.

22. Stipulation extending time for briefs on motions.

23. Order extending time for respective counsel to file briefs on motions.

24. Minutes of the court of 10/8/56—motions to dismiss and to strike taken under advisement.

25. Request of plaintiffs for admissions.

26. Response of defendant to request for admissions.

27. Request of defendant for admissions.

28. Withdrawal of request for trial by jury.

29. Notice of taking deposition of William S. Gagon and Jessie Gagon.

30. Response of plaintiffs to request for admissions.

31. Plaintiffs' additional request for admissions.

32. Response to plaintiffs' additional request for admissions.

33. Motion of defendant for production of documents, etc., filed 11/26/56.

34. Notice of motion for production of documents, etc.

35. Minutes of the court of 11/29/56 denying motion for production of documents, etc.

36. Motion of defendant for production of documents, etc., filed 11/30/56.

37. Notice of motion of 11/30/56 for production of documents, etc.

38. Minutes of the court of 12/3/56 granting motion of 11/30/56 for production of documents, etc.

39. Minutes of the court of 12/7/56 vacating court trial and ordering case submitted on briefs.

40. Stipulation re documents, etc.

41. Stipulation and order extending time for briefs.

42. Stipulation and order extending time for defendant to file brief.

43. Stipulation for additional time for defendant to file brief.

44. Opinion of the Court, filed 9/25/57.

45. Stipulation and order extending time for plaintiffs to file objections or response to findings of fact and conclusions of law.

46. Exceptions of plaintiffs to findings of fact and conclusions of law and proposed amendments.

47. Order overruling proposed amendments and objections to findings of fact and conclusions of law.

48. Findings of fact and conclusions of law and judgment, filed 1/31/58.

49. Notice of appeal by plaintiffs, filed 2/24/58.

50. Bond on appeal, filed 2/24/58.

51. Acknowledgment of service of notice and bond on appeal of 2/24/58.

52. Designation of record on appeal, filed 3/5/58.

53. Mandate of U. S. Court of Appeals.

54. Stipulation resubmitting cause to U. S. District Court.

55. Opinion of the Court, filed 3/15/60.

56. Plaintiffs' proposed findings of fact, conclusions of law and judgment.

57. Exceptions to findings of fact and conclusions of law, filed 4/12/60.

58. Affidavit of service of proposed findings, etc.

59. Order overruling exceptions to proposed findings, etc., filed 5/5/60.

60. Findings of fact, conclusions of law, and judgment, filed 5/5/60.

61. Judgment.

62. Notice of appeal, filed 5/20/60.

63. Designation of record on appeal, filed 5/20/60.

64. Bond on appeal, filed 5/20/60.

65. Acknowledgment of service of Notice and Bond on appeal, filed 5/20/60.

66. Deposition of Jessie Gagon and William S. Gagon.

67. Depositions of M. Burke Horsley and C. H. Elle.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 25th day of June, 1960.

[Seal] ED. M. BRYAN,
Clerk;

By /s/ LONA MANSER,
Deputy.

[Endorsed]: No. 16994. United States Court of Appeals for the Ninth Circuit. C. H. Elle Construction Co., a Corporation, and St. Paul-Mercury Indemnity Co., a Corporation, Appellants, vs. Western Casualty and Surety Co., a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Eastern Division.

Filed June 27, 1960.

Docketed July 8, 1960.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16994

C. H. ELLE CONSTRUCTION CO., a Corporation, and ST. PAUL-MERCURY INDEMNITY CO., a Corporation,

Plaintiffs-Appellants,

vs.

WESTERN CASUALTY AND SURETY COMPANY, a Corporation,

Defendant-Appellee.

STATEMENT OF POINTS ON APPEAL

Plaintiffs-Appellants herewith present their statement of points upon which they will rely on the appeal in this matter:

I.

That the Trial Court erred in its Findings of Fact VII in finding:

"That the vehicle owned by William S. Gagon, insured by Western Casualty and Surety Company, a corporation, was being driven by M. Burke Horsley without the permission, express or implied, of the named insured in said policy, namely, William S. Gagon.

"That at no time previous to this occasion had M. Burke Horsley borrowed said truck or used said

truck as an employee of the C. H. Elle Construction Company, or any other truck owned by William S. Gagon, in the furtherance of either his business or that of the C. H. Elle Construction Company."

II.

That the Trial Court erred in its Findings of Fact X in finding:

"* * * That the truck was not being used with the M. Burke Horsley, C. H. Elle Construction Co., a corporation, or any other of the C. H. Elle Construction employees ever borrowed this truck or any other truck owned by William S. Gagon."

III.

That the Trial Court erred in its Findings of Fact XI in finding:

"* * * That the truck was not being used with the knowledge or permission, express or implied, of the named insured in said policy nor was the lending ever ratified by said named insured nor did said named insured, at said time or at any other time, directly or indirectly, authorize M. Burke Horsley, or grant permission to him, to use said truck in the employ of C. H. Elle Construction Company, nor had Jessie Gagon on said date, or any other date, loaned the equipment of this particular truck to M. Burke Horsley or to any other person."

IV.

That the Trial Court erred in its Findings of Fact XII in finding:

"That the said Jessie Gagon kept the books of the Gagon Lumber Yard but had nothing to do with the buying or selling or handling of the business affairs of said lumber yard, save and except in the capacity of keeping books at the place of business; that the said Jessie Gagon was not named in said policy of insurance issued by the Western Casualty and Surety Company, a corporation, as an insured."

V.

That the Trial Court erred in its Findings of Fact XIII in finding:

"That the said 1954 Chevrolet truck owned by William S. Gagon, at the time of the accident in which Arnold Campbell was killed, was not being used with the knowledge or permission of the named insured in said policy."

VI.

That the Trial Court erred in its Conclusion of Law I that the truck being driven by M. Burke Horsley was not being driven with the permission or consent of the named insured nor was the use thereof ever ratified by the named insured.

VII.

That the Trial Court erred in its Conclusions of Law II that the said truck was not being driven with the permission of the named insured, the policy of insurance issued by Western Casualty and Surety Company did not insure the said M.

Burke Horsley or C. H. Elle Construction Company.

VIII.

That the Trial Court erred in its Conclusions of Law III holding that the plaintiff, St. Paul-Mercury Indemnity Company, a corporation, did have an obligation to pay said judgment against M. Burke Horsley and C. H. Elle Construction Company, a corporation.

IX.

That the Trial Court erred in its Conclusions of Law IV in holding that the St. Paul-Mercury Indemnity Company does not have any claim against the Western Casualty and Surety Company, and that the Western Casualty and Surety Company has no legal obligation to pay St. Paul-Mercury Indemnity Company the amount of the judgment rendered against C. H. Elle Construction Company and M. Burke Horsley.

X.

That the Trial Court erred in its Conclusions of Law V in holding that the truck involved herein was being driven without the permission, express or implied, of the named insured.

XI.

That the Trial Court erred in entering judgment in favor of the defendant and against the plaintiffs.

XII.

That the Trial Court erred in not holding that the vehicle involved herein was being operated with

permission under the terms of the insurance policy issued by Western Casualty and Surety Company, and in not holding that the said Western Casualty and Surety Company had the legal obligation to pay that certain judgment entered in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock, entitled Mary Lou Campbell, et al., vs. C. H. Elle Construction Company, et al., up to the limits of its policy, and in not granting judgment to the plaintiffs and against the defendant in the sum of $13,630.93, plus interest from April 18, 1956, the date of the satisfaction of said judgment by the plaintiffs, together with costs.

Dated this 8th day of July, 1960.

MERRILL & MERRILL,

By /s/ W. F. MERRILL,
Attorneys for Plaintiff-Appellants.

Service of the foregoing acknowledged this 8th day of July, 1960.

BAUM & PETERSON,

By /s/ O. H. BAUM.

[Endorsed]: Filed July 11, 1960.

[Title of Court of Appeals and Cause.]

STIPULATION CONCERNING PRINTING OF RECORD

Whereas, the pleadings, evidence and record in the above-entitled cause now on appeal are identical with the pleadings, evidence and record in Case No. 15932 entitled C. H. Elle Construction Co., a corporation, and St. Paul-Mercury Indemnity Co., a corporation, Appellants, vs. Western Casualty and Surety Company, a corporation, Appellee, heretofore filed in this Court, save and except for the proceedings had in the trial court since the mandate of the Court of Appeals, Ninth Circuit, filed February 11, 1959; and

Whereas, the proceedings had in the said trial court since the mandate of the Court of Appeals, Ninth Circuit, filed February 11, 1959, may, in addition to the above-printed record, be designated in the usual manner as the contents of record on appeal and printed pursuant to the rules of the Court; and

Whereas, it would serve no useful purpose to reprint the existing record for use in this appeal;

Now, Therefore, It Is Hereby Stipulated by the parties, through their attorneys of record, that the record in the case No. 15932, C. H. Elle Construction Co., a corporation, and St. Paul-Mercury Indemnity Co., a corporation, Appellants, vs. Western Casualty and Surety Company, a corporation, Ap-

pellee, shall stand as a portion of the record on appeal in this appeal, and in addition thereto there may be designated in the usual manner as contents of the record on appeal the proceedings had in the trial court since the mandate of the Court of Appeals, Ninth Circuit, filed February 11, 1959, said additional items to be printed pursuant to the rules of the Court.

It Is Further Stipulated that a copy of this Stipulation and Order thereon shall be included in that portion of the record to be printed in this case.

Dated this 6th day of July, 1960.

MERRILL & MERRILL,

By /s/ W. F. MERRILL,
Attorneys for Appellants.

BAUM & PETERSON,

By /s/ BEN PETERSON,
Attorneys for Appellee.

So Ordered:

/s/ RICHARD H. CHAMBERS,
Chief Judge, U. S. Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed July 11, 1960.